

United States

Circuit Court of Appeals

For the Ninth Circuit. 6

INVESTORS SYNDICATE, PORTLAND TRUST
AND SAVINGS BANK, Trustee, and MET-
ROPOLITAN LIFE INSURANCE COM-
PANY.

Appellants,

vs.

LLOYD R. SMITH, Trustee in the Matter of
Guaranty Trust Company, a corporation, and
National Investment Company, a corporation,
its affiliate, Bankrupts, GESINA KING,
HELEN WINSOR JOHNSON, BERT WHY
and ELSA STRATHMAN, MRS. GOW WHY,
CONRAD BAURIEDEL, IDA ISABELL
NEILSON, GEORGE J. and EMMA C.
FOURIER, JAMES T. JONES and LOUIS
KNUTSON, and RALPH A. COAN and S. J.
BISCHOFF.

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Oregon.

PAUL P. O'BRIEN,

CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

STEPHEN H. BOYLES,

Mead Building,
Portland, Oregon,

HERBERT L. SWETT,

Pacific Building,
Portland, Oregon.

VERNE DUSENBERY,

Spalding Building,
Portland, Oregon,
For Appellants.

McCAMANT, THOMPSON & KING,

American Bank Building,
Portland, Oregon,
For Lloyd R. Smith, Trustee, Appellee.

S. J. BISCHOFF,

Public Service Building,
Portland, Oregon,

RALPH A. COAN,

Pittock Block,
Portland, Oregon,
For Intervening Creditors, Appellees.

In the District Court of the United States,
for the District of Oregon

No. B-18784

In the Matter of

GUARANTY TRUST COMPANY, a corpo-
ration, and NATIONAL INVESTMENT
COMPANY, a corporation, its affiliate,
Bankrupts.

INVESTORS SYNDICATE, PORTLAND TRUST
AND SAVINGS BANK, Trustee, and MET-
ROPOLITAN LIFE INSURANCE COM-
PANY,

Appellants,

vs.

LLOYD R. SMITH, Trustee in the Matter of
Guaranty Trust Company, a corporation, and
National Investment Company, a corporation,
its affiliate, Bankrupts, GESINA KING,
HELEN WINSOR JOHNSON, BERT WHY
and ELSA STRATHMAN, Petitioning Cred-
itors, MRS. GOW WHY, CONRAD BAURIE-
DEL, IDA ISABELL NEILSON, GEORGE
J. and EMMA C. FOURIER, JAMES T.
JONES and LOUIS KNUTSON, Intervening
Creditors, and RALPH A. COAN and S. J.
BISCHOFF,

Appellees.

CITATION ON APPEAL

To Lloyd R. Smith, Trustee in the Matter of Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, Bankrupts, Gesina King, Helen Winsor Johnson, Bert Why and Elsa Strathman, Petitioning Creditors Mrs. Gow Why, Conrad Bauriedel, Ida Isabell Neilson, George J. and Emma C. Fourier, James T. Jones and Louis Knutson, Intervening Creditors, and Ralph A. Coan and S. J. Bischoff, and each of you Greeting:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, in said Circuit, within thirty days from the date of this writ, pursuant to a Petition on Appeal and Assignment of Errors filed jointly and severally by Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, and each of them, in the Clerk's Office of the District Court of the United States, for the District of Oregon, In re Matter of Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, Bankrupts, to show cause if any there be why the order rendered in said cause on the 8th day of June, 1938, sustaining the exceptions

of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to the Conclusions of Law numbered from one to ten inclusive of the Report of the Special Master on file in said proceedings, and holding that the rentals in the hands of the Trustee in Bankruptcy collected from mortgaged properties constitute general assets applicable for the payment of expenses of administration and the claims of the general creditors, as in said Petition on Appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Alger Fee, Judge of the United States District Court, for the District of Oregon, this 1st day of July, 1938.

JAMES ALGER FEE

United States District Judge

Service of the within Citation and receipt of a copy thereof, admitted the 5th day of July, 1938.

McCAMANT, THOMPSON,

KING & WOOD

Of Attorneys for Lloyd R. Smith,
Trustees in Bankruptcy

S. J. BISCHOFF & RALPH A. COAN

Attorneys for Petitioning and
Intervening Creditors

S. J. BISCHOFF & RALPH A. COAN

Appellees

[Endorsed]: Filed July 5, 1938.

[Title of District Court and Cause.]

AGREED STATEMENT OF THE CASE
UNDER EQUITY RULE 77

It is hereby stipulated by and between the parties to this appeal that the questions presented by this appeal can be determined by the Appellate Court without an examination of all of the pleadings and evidence, and that the following is a statement of the case showing how the questions arose and were decided in the District Court, and sets forth only so much of the facts alleged and proved, or sought to be proved, as is essential to decision of such questions by the Appellate Court:

This cause arises on appeal from an order of the District Court dated June 8, 1938, sustaining exceptions to the Special Master's report dated November 14, 1936, filed November 16, 1936, which order is part of the record on this appeal.

The present bankruptcy proceedings were instituted on January 29 1934, [1*] by filing of an involuntary petition in bankruptcy against Guaranty Trust Company, which proceedings shortly thereafter were extended to include and made to apply to National Investment Company, a wholly owned corporation affiliated with Guaranty Trust Company. While such proceedings were pending on such involuntary petition, and before adjudication in bankruptcy, to wit, on July 11, 1934, a supplemental answer of Guaranty Trust Company was

*Page numbering appearing at the foot of page of original certified Transcript of Record.

filed to the original involuntary petition and an intervening petition, praying for reorganization of the alleged bankrupt under Section 77B of the Bankruptcy Act. On the same date an ex parte order was entered to the effect that said supplemental answer was filed in good faith under Section 77B, and the entire matter was referred to Roy F. Shields, Special Master, to have hearings thereon and to make his report to the Court. Thereafter, pursuant to due notice to creditors, a hearing was held before the Special Master on August 2, 1934. By the Special Master's Report filed August 13, 1934, it appears that among the parties present at such hearing were the attorneys for the appellants herein, who "appeared and announced that they intended to appear specially in behalf of the several creditors holding mortgages upon the several parcels of real property owned by the alleged bankrupt and/or its affiliated corporation, the National Investment Company". The Special Master's report further set forth that the petitioning and intervening creditors as well as the mortgage creditors, including appellants herein, opposed the continuance of the alleged bankrupt in possession of the assets and business of the corporation. Said report further shows that at an adjourned hearing there was filed with the Special Master by counsel for appellants, written objections to the plan of reorganization embodied in said supplemental answer of the debtor, and oral objections to the continuance of the bankrupt in possession during the

pendency of the proceedings. The Special Master found that it was for the best interests of the parties that a trustee be appointed to take possession of the debtor's assets, and he further found and recommended:

“that a separate account should be kept by the trustee of all moneys coming into his hands from the several sources so that the disposition of said funds can ultimately be made in accordance with the determination that the Court may hereafter make as to the ownership thereof, and in particular that separate account be kept of the moneys received from the operation of each of the properties covered by said mortgage”. [2]

The Master further recommended that

“an order be made and entered herein appointing a trustee of the property, assets and business of the alleged bankrupt, with instructions that all income, revenue and receipts that shall come into his hands shall be segregated and handled as above suggested”.

The Court, on August 13, 1934, confirmed the foregoing report and appointed a trustee to take possession of the property, assets and business of the debtor companies, with authority to manage, operate and control the property and assets coming into his possession, which order further states:

“Ordered that the said Trustee will keep separate accounts of all moneys coming into his

possession from each of the several properties of the debtor or its said affiliate, and that the trustee's accounts shall be kept so that all income and revenues received and expense incurred in the operation of each of such properties can at all times be ascertained and segregated."

Owing to the fact that the named trustee did not qualify, a new order was entered September 10, 1934, appointing C. W. Twining as Trustee, with power and authority similar to the foregoing and containing the above quoted provision as to accounting of moneys. Said trustee qualified.

Prior to the filing of the involuntary petition in bankruptcy herein, to wit, under date of August 2, 1933, Portland Trust & Savings Bank, Trustee, one of the appellants herein filed in the Circuit Court for Multnomah County, Oregon, two foreclosure suits on real properties the legal title to which was vested in Guaranty Trust Company. One foreclosure covered the apartment house known as Adele Manor and the other foreclosure covered the apartment house known as Charmaine Manor, being numbered in the said Circuit Court 110-661 and 110-662, respectively. The mortgages involved in these suits were both delinquent as to payment of principal, interest and taxes, interest being delinquent for more than one year and no taxes having been paid on the mortgaged premises since the year 1929. Each suit was brought for full balance of

the mortgages, by right of acceleration reserved in the mortgages. At the time of the filing of these suits, plaintiff therein applied for the appointment of a receiver, but at the time of hearing said application in each of said causes, the Judge of the [3] state court entered the following order:

“[Title of Court and Cause.]

ORDER

“This cause coming on regularly for hearing this 10th day of August, 1933, on the order issued in the above entitled Court and cause on the 2nd day of August, 1933, requiring the defendant Guaranty Trust Company to show cause before this Court why an order should not be entered herein appointing some suitable and proper person to act as Receiver of the property involved in said suit during the pendency thereof, the plaintiff appearing by its attorney, Verne Dusenbery, and the defendant Guaranty Trust Company appearing by its attorney, John W. Kaste; and

It appearing to the satisfaction of the Court, after due hearing and upon said order to show cause, that the property involved in said foreclosure suit is an apartment house consisting of twenty-three apartments which are yielding a monthly rental income, and that in the opinion of the Court, the interest of all parties to said suit may be protected by requiring the defendant, Guaranty Trust Company, to file in

this Court during the pendency of this suit, verified monthly accounts showing all money received and all disbursements made in the operation of said apartment house, and to pay the net income from said property into Court to be disposed of according to the further order of the Court, and that the necessity of a receiver may be thereby dispensed with:

It is ordered that on the 12th day of August, 1933, and monthly thereafter on the 12th day of each and every month during the pendency of this suit, the defendant Guaranty Trust Company serve on the attorneys for the plaintiff and file herein, a verified account and report covering the operation of the apartment house involved in this suit during the preceding month (the first of said reports covering the period of time from August 1st to and including August 11th, 1933), showing all rentals and other income received from said apartment house and all disbursements made on account thereof during said accounting period; and that said Guaranty Trust Company, at the time of filing said account and report, pay into the Court the net income derived [4] from said mortgaged premises during said accounting period, to be held as a part of the security for said mortgage indebtedness and to be applied according to the further orders of the Court.

Dated this 10th day of August, 1933.

1/s/ HALL S. LUSK

Judge''

Thereafter and prior to bankruptcy, the State Court modified said order by providing that Guaranty Trust Company might deduct from the net rentals 20% as compensation for use of furniture owned by Guaranty Trust Company and situated in said apartment houses.

On the date of said order and continuing until the month of June, 1934, Guaranty Trust Company filed in said state foreclosure suits monthly statements in compliance with said orders and paid to the clerk of said court the net rentals derived from said apartment houses, after deductions as aforesaid. These moneys are not involved in the present proceeding since the bankruptcy court neither required nor claimed jurisdiction thereover.

On January 31, 1934, the District Court made an order herein to the effect that "all suits, actions, and proceedings now pending against the alleged bankrupt be stayed until the entry of an order of adjudication herein * * *". On April 25, 1934, Guaranty Trust Company filed in the bankruptcy proceedings a motion, supported by affidavit, for an order modifying the order of January 31, 1934, insofar as same affected the said foreclosure suits of Portland Trust & Savings Bank in the State Court, numbered 110-661 and 110-662. Said motion to modify was granted by an order in the Bankruptcy Court dated April 25, 1934, stating as follows:

"1. That the alleged bankrupt shall not be restrained from complying with the order of

the Circuit Court of the State of Oregon, entered in the aforesaid foreclosure proceedings, requiring it to pay into Court monthly the net proceeds derived from the operation of the properties described in the foreclosure proceedings.

2. That the parties to the two foreclosure proceedings pending in the Circuit Court of the State of Oregon, for Multnomah County, respectively numbered 110661 and 110662, shall be and they hereby are permitted to continue the prosecution proceedings, with leave, however, to renew the [5] application for a stay of said proceedings.”

Upon the institution of 77B proceedings herein in June 1934, Guaranty Trust Company continued to make monthly reports of receipts and disbursements derived from said apartment houses, but instead of filing same with the clerk of said court, delivered same to John W. Kaste, general counsel for Guaranty Trust Company, and paid to him from month to month the amount of said net rentals. Said monthly reports and net rentals were received and held by John W. Kaste, he being uncertain to whom said funds belonged, until possession of said mortgaged premises was taken by the Trustee in Bankruptcy herein on September 11, 1934. Thereafter, until November 1934, C. W. Twining as such Trustee in Bankruptcy, paid over to said Kaste the net monthly rentals derived from said apartment houses

with the intention that same be paid to the clerk of the court in which said foreclosure proceedings were pending. In this manner there was accumulated in the hands of John W. Kaste the sum of \$2050.00, from which had been deducted 5% management fee, but without deduction for use of furniture. After the month of November 1934 said Trustee made no further payments to said Kaste on account of rentals on Adele Manor or Charmaine Manor apartments, but retained same. Later, pursuant to order of the District Court in the bankruptcy proceedings, said sum of \$2050.00 was paid by Kaste to said Trustee and has ever since been retained by the Trustee and his successors in office.

All moneys collected by the Trustee herein and his successors in office, by way of rental from the Adele Manor and Charmaine Manor apartments, mortgaged to Portland Trust and Savings Bank as aforesaid, have been placed and are still held in a separate bank account, and the Trustee has reported of record that all of said rentals so collected by the Trustee aggregate the sum of \$7709.00, for which the present Trustee holds certificates of deposit in The Bank of California.

At the hearing before the Special Master, November 20, 1935, S. J. Bischoff, one of the attorneys for the Petitioning and Intervening Creditors, was sworn and examined as a witness on his own behalf by Ralph Coan, who was also attorney for the Petitioning and Intervening Creditors, and was cross-[6] examined by John W. Kaste, attorney for the

debtor, as follows: (At said hearing it was stipulated by all parties that all evidence presented at said hearing, insofar as applicable, might be considered for or against any petition then being heard)

“Q. Did Jay Moltzner ever call you from the directors’ room?

“A. Yes, he did; he called me up to inquire the amount of money that was on hand with the trustee.

“Q. And did you tell him over the telephone that you would find out from Mr. Twining in a few minutes and call him back?

“A. I told him that we would try to get the figures from Mr. Twining and phone him, in fact I told him that I was busy at the time and I would have Mr. Coan communicate with Mr. Twining.

“Q. And did you get the figures from Mr. Twining and telephone them to Mr. Moltzner?

“A. I don’t know. Mr. Coan handled that.

“Mr. Coan: You can put me in the record as saying I did.

“Mr. Kaste: And did you thereupon telephone to Mr. Moltzner the amount of money which was in the trust fund?

“Mr. Coan: No, I told him the information I had received from Mr. Twining.

“Mr. Kaste: And what was that information that you received from Mr. Twining as to the amount of money that was in the trust

fund? By 'trust fund' I mean money that had been segregated and held apart as money for the mortgagees.

"The Witness: Is that question directed to me or Mr. Coan.

"Mr. Kaste: You said you didn't know.

"Mr. Coan: You had better have me sworn.

"The Special Master: Well, counsel is just asking you, I suppose.

"Mr. Coan: All right. I think about six thousand dollars as I remember it.

"Mr. Kaste: You got that information from Mr. Twining?

"Mr. Coan: Over the telephone.

"Q. (By Mr. Kaste): Now, Mr. Bischoff, why was the money in the trust fund brought into the picture of a proposed settlement? Was it for the purpose of having the officers of the corporation use the trust fund for the purpose of making a settlement with you?

"A. I don't know why Mr. Moltzner wanted that information, but in the course of our conversation the question of how they were to pay the settlement arose and we told Mr. Moltzner that under no circumstances would we be a party to any proceedings contemplated taking any money on deposit; that if they were going to make a settlement it would have to be with funds coming from an independent source."

By the present appeals each of the appellants, as mortgage creditors, seeks to assert its claim to all rents and profits collected or received by the Trustee of this bankrupt estate from the respective mortgaged properties, less management fee and furniture rental. The claims so asserted are as follows:

[7]

Portland Trust and Savings Bank under date of February 5, 1935, duly served and filed in the bankruptcy proceedings a verified petition for rents and profits which, omitting formal parts, is as follows: [8]

[Title of Court and Cause.]

PETITION OF PORTLAND TRUST AND SAVINGS BANK, TRUSTEE, FOR ORDER DIRECTING PAYMENT OF RENTS AND PROFITS

Comes now Portland Trust and Savings Bank, Trustee, and respectfully petitions the Court for an order requiring John W. Kaste, the attorney for the alleged bankrupt, and C. W. Twining, Trustee in Bankruptcy, to pay rents and profits of real property hereinafter described, and in support of said petition alleges:

I.

That petitioner now is, and at all times herein mentioned has been, a savings bank and trust company organized under the laws of the State of Oregon, transacting business in Portland, Multnomah County, Oregon.

That C. W. Twining is the duly appointed, qualified, and acting Trustee in Bankruptcy under order entered herein pursuant to the provisions of Section 77B of the National Bankruptcy Act.

That John W. Kaste now is, and at all times herein mentioned has been, an attorney of record in the above entitled cause for Guaranty Trust Company, the alleged bankrupt, and National Investment Corporation, its affiliate.

II.

That on or about the 28th day of March, 1928, Harry Mittleman and Helen R. Mittleman, for a valuable consideration executed and delivered to Portland Trust and Savings Bank, as Trustee, seventy-nine promissory notes, dated on that day, whereby they promised to pay to said Portland Trust and Savings Bank the sum of \$52,500.00, according to the tenor and effect of said promissory notes.

That on or about the 30th day of March, 1928, the said Harry Mittleman and Helen R. Mittleman were the owners in fee simple of that certain real property situated in the City of Portland, Multnomah County, Oregon, and described as Lots numbered Thirty (30), and Thirty-four (34), in Cedar Hill, an addition within the corporate limits of the City of Portland, and for a valuable consideration to them in hand paid the said Harry Mittleman and Helen [9] R. Mittleman executed and delivered to Portland Trust and Savings Bank a mortgage in-

strument in writing, whereby said real property was mortgaged to petitioner to secure the payment of the above described promissory notes, and said mortgage was recorded on the 2nd day of April, 1928, in Book 1320, at page 261 of the Mortgage Records of Multnomah County, Oregon. That the balance unpaid on said mortgage indebtedness is the sum of \$48,500.00, with interest thereon at seven per cent per annum from the 5th day of December, 1932.

III.

That on or about the 17th day of July, 1928, Harry Mittleman and Helen R. Mittleman, for a valuable consideration, executed and delivered to Portland Trust and Savings Bank, as Trustee, seventy-one promissory notes, dated on that day, whereby they promised to pay to said Portland Trust and Savings Bank the sum of \$50,000.00, according to the tenor and effect of said promissory notes.

That on or about the 17th day of July, 1928, the said Harry Mittleman and Helen R. Mittleman were the owners in fee simple of that certain real property situated in the City of Portland, Multnomah County, Oregon, and described as Lots numbered Twenty-nine (29) and Thirty-five (35), in Cedar Hill, an Addition within the corporate limits of the City of Portland, Multnomah County, Oregon, and for a valuable consideration to them in hand paid, the said Harry Mittleman and Helen R. Mittleman executed and delivered to Portland Trust

and Savings Bank a mortgage instrument in writing, whereby said real property was mortgaged to petitioner to secure the payment of the above described promissory notes, and said mortgage was recorded on the 18th day of July, 1928, in Book 1345, at page 209 of the Mortgage Records of Multnomah County, Oregon. That the balance unpaid on said mortgage indebtedness is the sum of \$47,000.00, with interest thereon at seven per cent per annum from the 17th day of October, 1932.

IV.

That Portland Trust and Savings Bank, as Trustee, has been at all times herein mentioned, and now is, the owner and holder of the promissory notes and mortgages described in paragraphs II and III hereof, and has full power and authority to collect and foreclose the same. That the tracts of real property [10] covered by and described in the foregoing mortgages have been by mesne conveyances transferred and conveyed to Guaranty Trust Company, a corporation, and said Guaranty Trust Company has assumed said mortgages and agreed to pay the indebtedness secured thereby.

V.

That the said Harry Mittleman and Helen R. Mittleman and Guaranty Trust Company, a corporation, failed to make the payments of principal and interest due under the terms and provisions of said promissory notes and mortgages as the same became due and payable, and by reason of said de-

faults, the petitioner filed on August 2, 1933, two separate suits to foreclose said mortgages in the Circuit Court of the State of Oregon for Multnomah County, one of said suits being cause number 110661, entitled Portland Trust and Savings Bank, a corporation, Trustee, Plaintiff, vs. Harry Mittleman and Helen R. Mittleman, husband and wife, Kate B. Winsor, Guaranty Trust Company, a corporation and Washington Mutual Savings Bank, a corporation, Defendants, for the foreclosure of the mortgage described in paragraph II hereof, and the other of said suits being cause number 110662, entitled Portland Trust and Savings Bank, a corporation, Trustee, Plaintiff, vs. Harry Mittleman and Helen R. Mittleman, husband and wife, Guaranty Trust Company, a corporation, and Washington Mutual Savings Bank, a corporation, Defendants, for the foreclosure of the mortgage described in paragraph III hereof. That answers to the complaints in said suits have been filed on behalf of the various defendants thereto, including Guaranty Trust Company, and said suits are still pending in said Court awaiting trial.

VI.

That at the time of the commencement of said suits the plaintiff moved the Court in each of said suits for the appointment of a receiver to take charge and possession of the mortgaged premises and to collect the rents, issues, and profits therefrom and apply the same according to the order of

the Court. That said motion for receiver was based upon the fact that the said mortgaged premises in each case were improved by an apartment house which was rented to various tenants and was yielding and capable of yielding a substantial sum in rentals, and upon the further ground that it is provided in said mortgages [11] that in the event of default in the payment of the principal and interest provided for in said notes and mortgages and the institution of foreclosure proceedings, a receiver should be forthwith appointed to collect the rents, issues, and profits from the mortgaged premises and apply the same according to the order of the Court, said rents and profits having been specifically mortgaged and hypothecated as a part of the security for said mortgage indebtedness. That said motions for the appointment of receivers in said foreclosure suits came on for hearing on the 10th day of August, 1933, the plaintiff appearing by its attorneys, Crum & Dusenbery, and the defendant, Guaranty Trust Company, appearing by its attorney, John W. Kaste; whereupon the Court, in lieu of appointing a receiver in said suits for the collection of the rents, issues, and profits deriving from said mortgaged premises, made and entered an order in each of said suits, dated August 10th, 1933, providing that in the opinion of the Court the interest of all parties to the suit would be protected by requiring the defendant, Guaranty Trust Company, to file in said Court during the

pendency of said suits verified monthly accounts showing all money received and all disbursements made in the operation of said apartment houses, and to pay the net income from said property into Court to be disposed of according to the further order of the Court; and the Court thereby ordered that on the 12th day of August, 1933, and monthly thereafter on the 12th day of each and every month during the pendency of said suits, the defendant, Guaranty Trust Company, serve on the attorneys for the plaintiff and file in said suits a verified account and report covering the operation of said apartment houses involved in said suits during the preceding month, the first of said reports covering the period of time from August 1st to and including August 11th, 1933, showing all rentals and other income received from said apartment houses and all disbursements made on account thereof during said accounting period; and that said Guaranty Trust Company at the time of filing said account and report, pay into said Court the net income derived from said mortgaged premises during said accounting period, to be held as a part of the security for said mortgage indebtedness and to be applied according to the further orders of the Court. [12]

That thereafter the orders above described requiring Guaranty Trust Company to pay all of the net rentals derived from said mortgaged premises into Court, were modified by subsequent orders of said Court entered in said foreclosure suits, whereby the Guaranty Trust Company was granted the right to retain from the net monthly rentals received

from said mortgaged premises an amount equivalent to twenty per cent thereof as compensation for the use of the furniture and fixtures contained in said apartment houses and belonging to said Guaranty Trust Company. And said orders for the payment of the net rentals derived from said mortgaged premises, as modified, have been, and now are, in full force and effect.

VII.

That pursuant to the orders of Court described in paragraph VI hereof, the said Guaranty Trust Company and its attorney, John W. Kaste, have served upon the petitioner and filed in said suits monthly statements showing the rents, issues, and profits derived from said premises and the disbursements made therefrom, since the 1st day of August, 1933, and up to and including the 11th day of May, 1934, and they have paid into the said Circuit Court of the State of Oregon for Multnomah County pursuant to said orders of Court the net rentals derived from said premises. But since the 11th day of May, 1934, the said Guaranty Trust Company and its attorney, John W. Kaste, have failed to serve or file the monthly reports showing the rentals received, disbursements made, and the net rentals accruing from said mortgaged premises, and have failed to pay said net rentals or any part thereof into said Circuit Court. That as petitioner is informed and believes, and alleges upon its information and belief, Guaranty Trust Company has paid

over to its attorney, John K. Kaste, the net rentals derived from said mortgaged premises which accrued between the 12th day of May, 1934, and the time when the control of said mortgaged premises was delivered to C. W. Twining, as Trustee in Bankruptcy herein, and that thereafter the said C. W. Twining, as such Trustee in Bankruptcy, paid said net rentals to said John W. Kaste until about the month of December, 1934, and that thereafter said net rentals have been retained by the said C. W. Twining, as Trustee in Bankruptcy. That petitioner has demanded of the said John W. Kaste the [13] payment of the said net rentals into the Circuit Court of the State of Oregon for Multnomah County pursuant to the orders of said Circuit Court herein described, but the said John W. Kaste has failed and refused to pay the same and has stated that he will continue to hold said net rentals until he is directed to pay the same by an order duly entered in this bankruptcy proceeding.

VIII.

That the said John W. Kaste is connected with said foreclosure suits and with this bankruptcy proceeding only in the capacity of attorney at law representing Guaranty Trust Company and National Investment Corporation; that the said John W. Kaste has no right to, interest in, or claim upon said funds, and that the same should be paid into the Circuit Court of the State of Oregon for Multnomah County, pursuant to the terms of said orders

of Court. That likewise, the net rentals derived from said mortgaged premises which are now in the possession of said C. W. Twining, as Trustee in Bankruptcy, constitute a part of the security for the mortgages described herein and were duly impounded by orders of Court entered in said foreclosure suits long prior to the time when this bankruptcy proceeding was instituted, and said funds should be paid into said Circuit Court.

Wherefore, petitioner prays that an order be entered herein authorizing and directing John W. Kaste and C. W. Twining, as Trustee in Bankruptcy herein, to pay to the Clerk of the Circuit Court for Multnomah County, State of Oregon, all of the net rentals derived from the mortgaged premises herein described, less twenty per cent thereof deducted for the use of the furniture situated in said premises and belonging to Guaranty Trust Company, and further directing that eighty per cent of the net income hereafter derived from said mortgaged premises by C. W. Twining, as Trustee in Bankruptcy, or any other Trustee in Bankruptcy herein, be paid into said Circuit Court; and for such other and further order as to the Court may seem meet and just.

PORTLAND TRUST AND
SAVINGS BANK

By C. W. DeGRAFF

Petitioner

Trustee

CRUM & DUSENBERY

Attorneys for Petitioner [14]

The detail relating to the mortgages relied upon by Portland Trust and Savings Bank is as follows: Under date of July 17th, 1928, Harry Mittleman and Helen R. Mittleman, as mortgagors, made, executed and delivered to Portland Trust and Savings Bank, Trustee, as mortgagee, mortgage covering Lots 29 and 35, Cedar Hill, Portland, Multnomah County, Oregon, being the Charmaine Apartments. This mortgage secured a loan of \$50,000.00 payable by 71 promissory notes, all bearing 7% interest, payable quarterly. Note No. 1 in the amount of \$500.00 was payable July 17, 1930; notes Nos. 2 to 32 in the amount of \$500.00 each were payable quarterly thereafter; notes Nos. 33 to 52 in the amount of \$750.00 each matured July 17, 1938; notes Nos. 53 to 71 for \$1,000.00 each matured July 17, 1938. The right of acceleration in case of default was provided for in the promissory notes and mortgages. Each of said mortgages contained the following provision:

“As a part of the security for the sums due and to become due the Mortgagee hereunder, the Mortgagor/s do/does hereby convey and assign all the rent, issues and profits of the mortgaged property above described from and after default by the Mortgagor/s in the payment of any sums due hereunder, or any other terms of this mortgage, and in any suit, action or proceeding to foreclose this mortgage, the court may, on motion of the party of the second part, or its assigns, and without notice, appoint

a receiver to collect the rents and profits issuing out of said premises during pendency of such foreclosure and until the right of redemption expires, and such rents and profits shall, after payment of all necessary expenses, be applied in payment, pro tanto, of the amounts due under this mortgage.”

The mortgage was duly and promptly recorded.

Under date of March 30, 1928, Harry Mittleman and Helen R. Mittleman, as mortgagors, made, executed and delivered to Portland Trust and Savings Bank, Trustee, as mortgagee, mortgage on Lots 30 and 34, Cedar Hill, Portland, Multnomah County, Oregon, being the Adele Manor Apartments. This mortgage secured a loan in the amount of \$52,500.00 represented by 79 notes, all bearing interest at 7%, payable quarterly. Notes Nos. 1 to 33, each in the amount of \$500.00. The first note matured March 28, 1930, and each succeeding note quarterly thereafter. Notes Nos. 33 to 53, inclusive, were for \$500.00 each, maturing March 28, 1938; Notes Nos. 54 to 79, inclusive, were for \$1,000.00 each, maturing March 28, 1938. The mortgage provided for acceleration in the event of default under any note and contained provisions identical with that [15] above quoted relating to the other mortgage between the same parties. The mortgage was duly and promptly recorded.

Both these properties thereafter were acquired by Guaranty Trust Company from said mortgagors.

Metropolitan Life Insurance Company filed a petition in the bankruptcy proceedings under date of October 24, 1934, after duly serving same, wherein it sought the leave, in a court other than the Bankruptcy Court, to foreclose the mortgage on the Mara Villa Apartments, and for an order requiring the Trustee in Bankruptcy to collect and segregate all rents and profits from said premises for application as therein prayed for, which petition, omitting formal parts thereof, is as follows:

[16]

[Title of Court and Cause.]

No. B-18784

PETITION

Comes now Metropolitan Life Insurance Company by Crum & Dusenbery, its attorneys, and respectfully petitions the Court for an order permitting petitioner to institute suit for the foreclosure of the mortgage hereinafter described and to join the debtor, Guaranty Trust Company, a corporation, National Investment Corporation, a corporation, and C. W. Twining, as Trustee herein, as parties defendant thereto; and for an order requiring said Trustee to collect and segregate in the name of Metropolitan Life Insurance Company all of the rents, issues, and profits from the mortgaged premises hereinafter described for application upon said mortgage indebtedness; and your petitioner respectfully shows to the Court and alleges:

I.

That petitioner, Metropolitan Life Insurance Company, is a corporation organized and existing under and by virtue of the laws of the State of New York;

That the debtor is a corporation organized and existing under and by virtue of the laws of the State of Oregon.

II.

That the petitioner is the owner and holder of a certain real estate mortgage executed by Irving A. Duncan and Ethel J. Duncan to Portland Trust and Savings Bank, and duly assigned to the petitioner herein, bearing date the 17th day of September, 1929, and duly recorded on the 17th day of September, 1929, in Book 38, on page 27 of the Mortgage Records of Multnomah County, Oregon. That said mortgage was given to secure a promissory note of even date therewith for the sum of \$25,000.00, and mortgaged as security for said indebtedness real property described as Lots numbered Eleven (11) and Twelve (12), in Block numbered One Hundred Seven (107), Irvington, an Addition within the corporate limits of the City of Portland, Multnomah County, Oregon.

III.

That said mortgage indebtedness was by the terms of said promissory [17] note payable \$750.00 on the first day of September, 1930, and a like payment on the first day of each and every March and Sep-

tember thereafter until March 1, 1940, when the balance of the principal of said note should become due and payable, with interest at the rate of six per cent per annum payable semi-annually.

IV.

That on the 18th day of July, 1930, the said Irving A. Duncan and Ethel J. Duncan, for a valuable consideration to them in hand paid by Guaranty Trust Company, executed and delivered to said Guaranty Trust Company their warranty deed dated on that date, and recorded on July 18th, 1930, in Book 86 at page 61 of the Photostat Deed Records of Multnomah County, Oregon, wherein and whereby they conveyed the premises described in said mortgage to the said Guaranty Trust Company subject to the mortgage above described, but the said Guaranty Trust Company did not assume or agree to pay said mortgage indebtedness; and ever since the date of said conveyance the said Guaranty Trust Company has been in possession of said mortgaged property and has been collecting the rents, issues, and profits thereof.

V.

That the said mortgagors and the said Guaranty Trust Company failed to make the payments provided for in said promissory note and mortgage but permitted the same to become delinquent. That the sum of \$2,644.03 has been paid upon the principal of said mortgage and the interest has been paid to

the 3rd day of May, 1933, but no other payments whatsoever have been made thereon and said mortgage is in a delinquent condition both as to principal and interest payments, the said principal being delinquent in the amount of \$4,105.97, and the said interest being delinquent since the 3rd day of May, 1933, in the amount of \$2,120.37 as of October 1st, 1934.

VI.

That according to the terms and provisions of said mortgage it was agreed that the mortgagors should pay all taxes and assessments levied and assessed against said premises before the same should become delinquent, but the said mortgagors and Guaranty Trust Company have failed to pay the taxes [18] levied and assessed against said premises for the years 1930, 1931, 1932, and 1933-34, and said delinquent taxes now amount to the sum of \$1,929.10, besides interest thereon.

VII.

That said mortgage, in addition to the property above described, mortgages as security for said debt the rents, issues and profits derived from said mortgaged premises and provides that upon default in the performance of any of the terms or conditions of said mortgage the mortgagee shall have the right to enter into and upon the premises and to take possession thereof and to collect the rents, issues and profits thereof and apply the same, less reasonable costs of collection, upon the indebtedness

thereby secured, and said mortgage further provides for the appointment of a receiver to collect and hold the same.

That said mortgaged property consists of an apartment house which is rented to various tenants and is yielding a large amount of revenue, the exact amount thereof being unknown to this petitioner. That said rentals as the same accumulate constitute a part of the security for the petitioner's debt, and said petitioner has a first lien thereon.

That for a long time last passed said rentals have been collected by the Guaranty Trust Company and not applied upon said mortgage indebtedness or the taxes levied and assessed against the mortgaged premises, but have been diverted to other uses.

VIII.

That the amount of said mortgage indebtedness with interest computed to October 1st, 1934, together with the delinquent taxes against said property, is the sum of \$26,405.34, not including interest upon delinquent taxes. That the apartment house situated on said premises has been permitted to deteriorate for want of proper repairs and maintenance, and by reason of the depression said property has depreciated in value so that the said mortgage and tax lien against said property equal or exceed the present value thereof, and this petitioner will in all probability suffer a loss unless the revenues of said property can be conserved and applied upon said mortgage indebtedness. [19]

IX.

That the debtor, Guaranty Trust Company, filed in this proceeding a plan of reorganization on or about the 11th day of June, 1934, and thereafter and on July 11th, 1934, filed its answer containing a second reorganization plan. That said second reorganization plan was submitted to various creditors of Guaranty Trust Company and was promptly rejected. That petitioner is advised and informed that Guaranty Trust Company has prepared and submitted to various of its creditors a third reorganization plan and that said plan has not been accepted by the various mortgage creditors of Guaranty Trust Company but that the same has been rejected by said mortgage creditors and that there is no reasonable probability that said third proposed plan will be accepted by said creditors.

Wherefore, petitioner prays that an order be entered herein authorizing Metropolitan Life Insurance Company to institute either in the Circuit Court of Multnomah County, Oregon, or in the District Court of the United States for the District of Oregon, a suit to foreclose the mortgage described in this petition, and to join as parties defendant to said suit Guaranty Trust Company, a corporation, National Investment Corporation, a corporation, and C. W. Twining, as Trustee in Bankruptcy herein, and requiring the Trustee herein to keep separate account of and to segregate in the name

of Metropolitan Life Insurance Company the rents, issues and profits derived from the mortgaged premises and property herein described to the end that the net proceeds therefrom may be paid into the Court in which such foreclosure suit is instituted and be applied upon the mortgage indebtedness herein described or the taxes levied and assessed against said premises, in accordance with the further order of this Court; and for such other and further order as to the Court may seem just and equitable.

CRUM & DUSENBERRY,
Attorneys for Petitioner, Metropolitan
Life Insurance Company. [20]

Said mortgage was executed and delivered by Irving A. Duncan and Ethel J. Duncan, mortgagors, to Portland Trust and Savings Bank, mortgagee, under date of September 17, 1929, and was thereafter duly assigned to Metropolitan Life Insurance Company, and covers Lots 11 and 12, Block 107, Irvington, Portland, Multnomah County, Oregon. Said mortgage was to secure repayment of a \$25,000.00 loan according to a promissory note of even date payable \$750.00 on the 1st day of September, 1930, and a like payment on the 1st day of March and September thereafter until March 1, 1940, when the balance of the principal of said note should become due and payable, with interest at the rate of 6% per annum, payable semi-annually. After the

legal description of the property, the mortgage contains the following provisions:

“To have and to hold, the granted premises,
* * * together with all of the rents, issues and
profits of the mortgaged property.”

Said mortgage further provides:

“The rents, issues and profits of the mortgaged property, to and until maturity of the indebtedness secured hereby, either by lapse of time or by reason of default of the Mortgagors, shall belong to the Mortgagors, but upon such maturity of said indebtedness for any cause, the Mortgagee shall have the right forthwith to enter into and upon the mortgaged premises and take possession thereof, and to collect the rents, issues and profits thereof, and apply the same, less reasonable costs of collection, upon the indebtedness hereby secured, and the Mortgagee shall have the right to the appointment of a receiver to collect the rents, issues and profits of the mortgaged premises immediately upon default of the Mortgagors and without notice.”

The mortgage was duly and promptly recorded. Thereafter the property was deeded to Guaranty Trust Company. This apartment house was unfurnished.

Investors Syndicate on October 22, 1934, duly served and files its petition in the bankruptcy proceedings for leave to foreclose its mortgages, in a

court other than the Bankruptcy Court, and to have the income from the mortgaged premises segregated, and in support thereof duly served and filed a verified petition, which, omitting the formal parts, is as follows: [21]

[Title of Court and Cause.]

No. B-18784.

PETITION IN SUPPORT OF MOTION TO
BRING SUIT AND TO HAVE INCOME
SEGREGATED.

To the Honorable John McNary and James Alger
Fee, Judges of the Above Entitled Court:

The Investors Syndicate, in support of its motion herein for an order granting it permission to institute a suit or suits for the foreclosure of its mortgages as hereinafter set forth, in the District Court of the United States, for the District of Oregon, and in said suit or suits to make as party defendants thereto the above-named debtor, Guaranty Trust Company, a corporation, its affiliate, National Investment Corporation, and C. W. Twining, as Trustee herein, alleges as follows:

I.

That the Investors Syndicate is a corporation organized and now existing under and by virtue of the laws of Minnesota, with its principal place of business at Minneapolis in said state and is a citizen of the State of Minnesota; that the debtor, Guaranty

Trust Company, and its affiliate National Investment Corporation are corporations organized and existing under and by virtue of the laws of the State of Oregon, and the said Guaranty Trust Company, National Investment Corporation and C. W. Twinning are citizens of the State of Oregon. That the amount of the claim of the Investors Syndicate as hereinafter set forth in Paragraph VI, exclusive of interest and costs, exceeds the sum of \$3,000.00. That in the event of the institution of a suit on the mortgages of the Investors Syndicate it will be necessary to join as defendants other parties. That none of said necessary defendants are citizens of the State of Minnesota.

II.

That as more fully appears from the records and files herein an involuntary petition in bankruptcy was filed in this court against the above named Guaranty Trust Company on or about the 29th day of January, 1934; that on or about the 11th day of June, 1934, a petition was filed on behalf of the Guaranty Trust Company wherein it submitted a proposed plan for reorganization under the [22] Corporate Reorganization Act, approved June 7, 1934, Sections 77-A and 77-B, Amendment to the National Bankruptcy Act. That thereafter, and on or about the 11th day of July, 1934, there was filed on behalf of the Guaranty Trust Company a supplemental answer herein setting out a new plan of reorganization under the said Corporate Reorganization Act and providing therein that every first

mortgage lien holder shall waive all accrued interest and accept new mortgages and stock or debentures for their mortgage indebtedness, as more fully set out in said answer. That said plan has not been approved or accepted by the Investors Syndicate and has specially been refused by the Investors Syndicate. That a further plan has been submitted to the Investors Syndicate providing for the waiver by the Investors Syndicate of all accrued interest and the giving of new mortgages for a period of ten years with interest at five per cent; that the Investors Syndicate has refused said plan. That on or about the 10th day of September, 1934, C. W. Twining was appointed as Trustee and is now Trustee in the above pending matter under the Corporate Reorganization Act.

III.

That as more fully appears from the Mortgage Records of Multnomah County, Oregon, the Investors Syndicate holds first mortgages upon certain property as hereinafter listed in Paragraph VI securing indebtedness due unto the Investors Syndicate as shown and on which payments are delinquent as hereinafter set forth; that the title to the real property is vested in the National Investment Corporation and was acquired by the National Investment Corporation prior to 1930 subject to the mortgages of the Investors Syndicate; that said mortgages, together with promissory notes evidencing the indebtedness are now owned and held by the Investors Syndicate.

IV.

That prior to the institution of the above proceeding in this Court and by reason of defaults and continued defaults on the payments on the mortgages, and each of them, occurring since the acquisition of the title thereto by the National Investment Corporation, foreclosure proceedings have, on said mortgages, been considered by the Investors Syndicate and on numerous occasions representatives of the National Investment Corporation and the Investors Syndicate have attempted to formulate a plan affecting the payments [23] on said mortgages agreeable to all parties concerned and under which the National Investment Corporation would be in position to carry the mortgages without defaults continuing thereunder.

That at the earnest solicitation of the National Investment Corporation and of the officers of the Guaranty Trust Company that foreclosure proceedings be withheld, and with their assurance that they would and could comply with certain conditions and modifications hereinafter referred to, the Investors Syndicate has during the past three years withheld foreclosure proceedings and did on three different occasions grant unto the National Investment Corporation certain temporary modifications of payments as to each of the mortgages of the Investors Syndicate upon and subject to the condition that the modification agreement be fully complied with.

That the first of said agreements was made November 23, 1931, at which time there existed a de-

linquency of approximately \$4366.25 on account of payments then due on said mortgages and unpaid taxes for 1929 aggregating the sum of \$1436.77 and all of the 1930 taxes. That said agreement provided that there be paid forthwith one monthly installment on each of said mortgages, payment of which was made as of October 10th, 1931 and receipt of which was acknowledged in said agreement, and beginning with the month of November, 1931 to and inclusive of April, 1932 there should be paid monthly the interest on each of said mortgages and in addition that the delinquent 1929 taxes would be paid on or before December 15, 1931; that the National Investment Corporation made the monthly payments of interest computed in the amount of \$521.08 monthly but failed to pay the delinquent taxes for 1929 in accordance with the said agreement and have at all times failed to make said payments of taxes and the Investors Syndicate did pay said taxes July 20, 1933, together with accrued interest.

That subsequent to the April, 1932 payment of interest and prior to August, 1932 no payments were made on account of said mortgage indebtedness or interest; that on or about August 17, 1932 and at the earnest solicitation of the National Investment Corporation but without any consideration unto the Investors Syndicate, the modification as to monthly payments above described was extended to July 1, 1933, subject to and on the condition that [24] the interest payments be made monthly, that the 1930

taxes on the respective properties be paid on or before November 5, 1932 and that the unpaid 1929 taxes be paid forthwith, and that the insurance premium then due on said fire policies on said properties in the amount of \$1014.20 be paid on or before October 17, 1932 and in addition to pay all insurance premiums as and when they become due. That the National Investment Corporation failed to comply with the conditions of said modification in that the monthly interest payments for the month of April, 1933 and thereafter were not paid; that it did not and has been paid any of said taxes nor has it paid said insurance premium except the sum of \$328.78 thereof; that in addition to its failure to pay insurance premium above referred to, it permitted to become delinquent and has at all times failed to pay a further insurance premium on Loan 6517 in the amount of \$612.00 and Loans No. 6972 and No. 7074 in the sum of \$40.60 each, hereinafter described, and the Investors Syndicate has paid said insurance premiums as hereinafter set out. That the Investors Syndicate has paid the 1930 taxes as hereinafter set out.

That subsequent to the interest payment on account of March, 1933 no payments were made on said mortgage indebtedness until December, 1933; that on or about November 29, 1933 and at the earnest solicitation of the National Investment Corporation a further modification was granted as to said mortgage payments and provided that beginning with the 12th day of November, 1933 to and

inclusive of March, 1935, all of the net income from the respective mortgaged properties would be paid unto the Investors Syndicate monthly on account of said mortgages and in an amount of not less than \$540.00 monthly, which said sum was to be allocated pro-ratably to each indebtedness secured by each of said mortgages; that the November minimum payment of \$540.00 was to be paid in quarterly monthly amounts beginning with the December payment; that said modification and forbearance was on the express condition that the payments and provisions thereof, and each and every requirement, covenant and condition as contained in each of said mortgages, except as modified, be fully performed and complied with and that current taxes except as modified, be fully performed and complied with and that [25] current taxes be paid as and when due. That the National Investment Corporation failed to comply with the conditions of said modification agreement in that they failed to make the minimum payments of \$675.00 due January 12th, 1934, except the sum of \$370.66 and that no other payments have been made pursuant to said modification.

That subsequent to said default the above matter in bankruptcy was filed in this court; that the National Investment Corporation by its officer and representative gave assurance to the representative of the Investors Syndicate that all of the income from the respective mortgaged properties of the Investors Syndicate was being held to the credit of the Inves-

tors Syndicate and that in his opinion the bankruptcy matter then pending would be satisfactorily terminated within the very near future; that on the insistence of representatives of the Investors Syndicate that something be done toward paying unto the Investors Syndicate the net income from the properties covered by the Investors Syndicate mortgages pending the bankruptcy matter there was proposed in April, 1934, by representatives of the National Investment Corporation that there would be turned over to the Investors Syndicate forthwith certain moneys to the credit of the Investors Syndicate in the approximate amount of \$1900.00 and thereafter the net income from the mortgaged properties until a proposed refinancing and liquidating of said mortgages under the R. F. C. to be completed prior to January 1, 1935, said arrangement to be subject to the approval of this court. That the National Investment Corporation was unable and failed to make said payment of \$1900.00 or any part thereof, except the sum of \$604.79, which said sum is now being held by the Northwest Mortgage Company of Portland, Oregon, representative of the Investors Syndicate. That said sum is not shown as a credit upon said mortgages in the amounts hereinafter set forth. That said amount will be duly accounted for and credited on said mortgages by the Investors Syndicate; that the Investors Syndicate is entitled to receive said sum and apply it on said mortgages.

V.

That the Investors Syndicate has granted unto the National Investment Corporation extreme

leniency and consideration in connection with the delinquencies [26] occurring on said mortgages and in so doing the principal indebtedness has increased during the past three years until at the present time the value of said properties is approximately equivalent to the indebtedness now against said properties and said indebtedness is only slightly reduced from the original amount thereof although seven and eight years have elapsed since the making of said mortgages. That the Investors Syndicate is limited in realizing upon its indebtedness to the security itself in that there is no personal liability that can be realized upon in connection with the said indebtedness.

That the annual net income from said properties under the operation of the National Investment Corporation as disclosed by Exhibit "J" filed by the Guaranty Trust Company in this matter, computed on the basis of income and expenses from January 1, 1934 to June 1, 1934, is shown to be the sum of \$6645.32 and exceeds the amount required to pay the minimum monthly payments on account of interest as fixed in the respective modification agreements.

That the monthly payments on the mortgages hereinafter described, and each of them, by reason of the failure of the National Investment Corporation to comply with and perform the conditions of the modification agreements hereinabove referred to, are in default in the aggregate sum of \$4366.25 accruing prior to November 23, 1931 modification agreement and all subsequent monthly payments are

provided for in said mortgages, less a credit on said monthly payments in the amount paid under said modification agreements and are further in default for want of payment of fire insurance premiums and taxes as herein set out.

VI.

That the property securing plaintiff's mortgages, and each of them, has no value over and above the mortgage indebtedness now due the Investors Syndicate and unpaid taxes accrued against said premises; that the said properties, and each of them, are being neglected and are in need of repair and a considerable expenditure for renovating and placing in a condition that will bring the greatest possible income therefrom. That a failure or neglect to make such repairs will and is resulting in increasing deterioration of said properties. That interest is accumulating on said indebtedness in the approximate amount of \$20.00 daily. That the Investors Syndicate will suffer a [27] material loss if its rights now existing to foreclose said mortgages and to receive the income from said property under the provisions of said mortgages be further delayed or postponed. That for the purpose of informing the Court relative to the present value of said mortgaged property the Investors Syndicate has obtained an appraisalment by Mr. B. L. Metzger, a realtor of Portland, Oregon, who is well experienced in the management and operation of apartment buildings and the value thereof. That attached

hereto marked and referred to as Exhibit "A" is the affidavit of Mr. Metzger as to the valuation of said properties.

That the following is a description of the mortgages included in the motion of the Investors Syndicate, together with a statement of the present status thereof and balances during the past three years showing an increase thereof.

Loan #5388 (Nordell Apartments) Lot 14, Block 11, King's Second Addition, Note and Mortgage, original amount.....\$ 26,000.00
 Dated March 10, 1926, with interest at 7% per annum, payable \$260 monthly on the 10th day of each month beginning August 10, 1926, recorded March 11, 1926, Book 1128, page 44, Mortgage Records for Multnomah County.
 Chattel Mortgage as additional security covering oil burner and refrigeration equipment situate in apartment building, recorded December 1, 1931, in Book 72, page 395, Chattel Mortgage Records.

Status of this indebtedness:

July 1, 1931 Balance Principal and Interest.....	\$ 19,874.33
Insurance paid by Investors Syndicate and charged to mortgage 7/1/32 and 8/3/32.....	\$478.40
January 1, 1933 Balance Principal and Interest.....	\$ 20,360.52
Charged to said mortgage since 1/1/33 1930 taxes paid 7/20/33.....	\$650.89
July 1, 1934 Balance Principal and Interest.....	\$ 22,317.74
Interest accrued 7/1/34 to 10/1/34.....	390.56
Unpaid taxes now accrued 1931, 1932 and 1934.....	1,624.95
	<hr/>
October 1, 1934 indebtedness.....	\$ 24,333.25
Present valuation (See Affidavit, Exhibit "A").....	\$ 27,000.00

Loan #5700 (Resthaven Apartments) Lot 10, Block 2, Goldsmith's Addition. Note and Mortgage, Original amount.....\$ 28,500.00
 Dated May 15, 1926, with interest at 7% per annum, payable \$285 monthly on the 15th day of each month, beginning October 15, 1926, recorded May 25, 1926, Book 1143, page 223, Mortgage Records for Multnomah County.

Chattel Mortgage as additional security covering oil burner and refrigeration equipment situate in apartment building, recorded December 1, 1931, in Book 72, page 389, Chattel Mortgage Records.

Status of this indebtedness:

July 1, 1931 Balance Principal and Interest.....	\$ 21,818.77
Insurance paid by Investors Syndicate and charged to mortgage 11/30/32.....	\$585.80
January 1, 1933, Balance Principal and Interest.....	\$ 22,363.16
Charged to said mortgage since 1/1/33 1930 taxes paid 7/20/33.....	\$647.90
July 1, 1934 Balance Principal and Interest.....	\$ 24,602.39
Interest accrued from 7/1/34 to 10/1/34.....	430.54
Unpaid taxes now accrued 1931, 1932 and 1934.....	1,606.05
	<hr/>
October 1, 1934 indebtedness.....	\$ 26,638.98
Present Valuation (See Affidavit, Exhibit "A").....	\$ 27,750.00

Loan #6517 (Chapman Court Apartments) Lots 1, 2, 6, 7 and 10, Block 22, Goldsmith's Addition, Note and Mortgage, original Amount..... \$ 50,000.00
 Dated November 20, 1926, with interest at 7% per annum, payable \$500 monthly, on the 20th day of each month, beginning May 20, 1927, recorded December 9, 1926, Book 1201, page 423, Mortgage Records of Multnomah County.
 Chattel Mortgage as additional security covering heating and refrigeration equipment situate in apartment building, recorded December 1, 1931, in Book 72, page 413, Chattel Mortgage Records.

Status of this indebtedness:

July 1, 1931 Balance Principal and Interest.....	\$ 40,706.29
January 1, 1933 Balance Principal and Int.....	40,286.52
Charges to said mortgage since 1/1/33 Insurance and 1929 and 1930 taxes paid 3/31/33 and 7/20/33 respectively.....	\$1936.21
July 1, 1934 Balance Principal and Interest.....	\$ 46,260.65
Interest accrued 7/1/34 to 10/1/34.....	809.56
Unpaid taxes now accrued 1931, 1932 and 1934.....	2,858.69
	<hr/>
October 1, 1934 indebtedness.....	\$ 49,928.90
Present Valuation (See Affidavit, Exhibit "A").....	46,850.00

Loan #6972 (Duplex Apartments) Lot 14, Block 22, Goldsmith's Addition, Note and Mortgage, original amount.....\$ 5,000.00
 Dated March 7, 1927, with interest at 7% per annum, payable \$50 monthly, on the 7th day of each month, beginning July 7, 1927, recorded March 8, 1927, Book 1221, page 339, Mortgage Records of Multnomah County.
 Chattel Mortgage as additional security covering heating and refrigeration equipment, recorded December 1, 1931, Book 72, page 401, Chattel Mortgage Records.

Status of this indebtedness:

July 1, 1931 Balance Principal and Interest.....	\$ 3,949.10
January 1, 1933 Balance Principal and Interest.....	3,953.80
Charged to said mortgage since 1/1/33 1929 and 1930 taxes and insurance paid 7/20/33 and 6/30/33 respectively	\$331.85
July 1, 1934 Balance Principal and Interest.....	\$ 4,583.60
Interest accrued from 7/1/34 to 10/1/34.....	\$ 80.21
Unpaid taxes now accrued 1931, 1932 and 1934.....	354.14

October 1, 1934 indebtedness.....	\$ 5,017.95
Present Valuation (See Affidavit, Exhibit "A").....	4,750.00

Loan #7074 (Duplex Apartments) Lot 11, Block 22, Goldsmith's Addition, Note and Mortgage Original amount.....\$ 5,000.00
 Dated March 22, 1927, with interest at 7% per annum, payable \$50.00 monthly on the 22nd day of each month, beginning July 22, 1927, recorded March 24, 1927, in Book 1234, page 146, Mortgage Records for Multnomah County.
 Chattel Mortgage as additional security covering oil burner and refrigeration equipment, recorded December 1, 1931 in Book 72, page 407, Chattel Mortgage Records.

Status of this indebtedness:

July 1, 1931 Balance Principal and Interest.....	\$ 3,949.10
January 1, 1933 Balance Principal and Interest.....	3,953.80
Charged to said mortgage since 1/1/33 Insurance, 1929 and 1930 taxes paid 6/30/33 and 7/20/33 respectively	\$331.85
July 1, 1934 Balance Principal and Interest.....	\$ 4,586.21
Interest accrued from 7/1/34 to 10/1/34.....	\$ 80.26
Unpaid taxes now accrued 1931, 1932 and 1934.....	354.14

October 1, 1934 Balance.....	\$ 5,020.61
Present Valuation (See Affidavit, Exhibit "A").....	4,750.00

Recapitulation:

Total Amount Due Investors Syndicate as of July 1, 1934	\$102,350.59
Total Amount Accrued Interest from 7/1/34 to 10/1/34	1,791.22
Total Amount Unpaid Taxes Due and Payable to and inclusive of 1934	6,797.97
<hr/>	
Total Indebtedness Investors Syndicate Mortgages October 1, 1934	\$110,939.78
Total Present Valuation as Listed in Exhibit "A"	111,100.00

VII.

That in support of that portion of the Investors Syndicate motion for an order directing the Trustee herein to segregate all of the net income received by him in the operation of said apartment houses to the account of the Investors Syndicate, pending the further order of this court, the Investors Syndicate reiterates the preceding allegations herein and further alleges that each of the mortgages hereinabove described include therein as a part of the security the "issues, rents and profits therefrom" as to each of the properties described and contain the further provisions that,

"The said Mortgagee, its successors, legal representatives or assigns, shall be at liberty, immediately after any default in the payment of the principal sum mentioned in the said note or of any installment thereof, or of the interest which shall accrue thereon, or of any part of either at the respective times therein specified for the payment thereof, upon a complaint filed or any other proper legal proceeding being commenced for the foreclosure of this mortgage, to

apply for, and the said Mortgagee shall be entitled to as a matter of right, without consideration of the value of the mortgaged premises as security for the amounts due the Mortgagee, or the solvency of any person or persons bound for the payment of such amounts, to the appointment by any competent Court, without notice to any owner, lessee or other party, of a Receiver to take possession of the premises, and/or to collect the rents, issues and profits of the said premises with the power to lease the said premises, or such part thereof as may not then be under lease, and with such other powers as may be deemed necessary, who, after deduction of all proper charges and expenses attending the execution of the said trust as received, shall apply the residue of the said rents and profits to the payment and satisfaction of the amount remaining secured hereby or to any deficiency which may exist after applying the proceeds of the sale of the said premises to the payment of the amount due, including interest and the costs and a reasonable attorney's fee for the foreclosure and sale".

VIII.

That in addition to the foregoing there was given by the mortgagor [31] unto the mortgagee as a further consideration for the mortgage loans and as additional security for the indebtedness described in the mortgages hereinabove referred to as Loans

Numbered 5388, 5700 and 6517 a separate assignment of rents as to each of said properties. That said assignments were respectively recorded as follows:

<u>Loan No</u>	<u>Description</u>	<u>Dated</u>	<u>Recorded</u>	<u>Mortgage Records Multnomah County, Ore. Book & Page</u>	
5388	Lot 14, Block 11, King's Second Addition to City of Portland	6/30/26	7/ 2/26	1161	406
5700	Lot 10, Block 2, Gold- smith's Addition to City of Portland	6/29/26	6/30/26	1165	13
6517	Lots 1, 2, 6, 7 and 10, Block 22, Goldsmith's Addition to City of Portland	11/20/26	12/ 9/26	1184	328

That attached hereto as Investors Syndicate Exhibit "B" is a copy of the Assignment of Rents given as to the property covered by Loan No. 6517 and a copy as to form of the assignment of rents in loans numbered 5388 and 5700. That the assignment of rents as to Loans No. 5388 and 5700 were given to the then named mortgagee, Western Bond and Mortgage Company; that the Western Bond and Mortgage Company did, by an assignment in writing, for a valuable consideration, duly assign the said mortgages and indebtedness thereby secured unto the Investors Syndicate, which assignments were duly recorded in the Records of Mortgages for Multnomah County, Oregon, as follows:

Mortgage described under Loan No. 5388, Assignment Recorded June 9, 1926, Book 1154, page 207.

Mortgage described under Loan No. 5700, Assignment Recorded November 6, 1926, Book 1184, page 177.

That the Investors Syndicate is the assignee of the Western Bond and Mortgage Company as to said mortgages and indebtedness thereby secured.

That the Investors Syndicate under said assignments is entitled to have rents, profits and income from said mortgaged properties applied to the mortgage indebtedness under the default now existing and pending the satisfaction of the Investors Syndicate mortgages by foreclosure or otherwise. That the Investors Syndicate believes it to be to the best interests of all parties [32] concerned if the said rents, issues and profits can be collected and held to the credit of the Investors Syndicate by the Trustee herein, C. W. Twining. That in the event said rents, issues and profits are not segregated and retained for application on the mortgage indebtedness the Investors Syndicate will suffer further and additional loss on its mortgages hereinabove described.

Wherefore, the Investors Syndicate prays of this court that it may be allowed to institute forthwith a suit or suits in the District Court of the United States, for the District of Oregon, for the foreclosure of the real and chattel mortgages as hereinabove described for the indebtedness due it on said respective mortgages and in said suit to make as party defendants thereto Guaranty Trust Company, a corporation, its affiliate, National Investment Cor-

poration, and C. W. Twining, as Trustee herein, to the end that any lien or interest they may have in and to said mortgaged property be fully determined and foreclosed in said suits.

The Investors Syndicate further prays that the Court enter an order herein directing the Trustee in this matter to collect and segregate in the name of the Investors Syndicate and for application upon the mortgage indebtedness due the Investors Syndicate, all of the rents, issues and profits now in the possession of, or coming to the Trustee herein, or which he may be entitled to receive accruing from the properties covered by the mortgages of the Investors Syndicate, pending the further order of this court.

(signed) STEPHEN H. BOYLES,
Attorney for Investors Syndicate. [33]

Attached to said petition and dated October 19, 1934, marked Exhibit "A", as a part thereof, is an affidavit of B. L. Metzger, an expert on appraisal of real property and particularly apartment buildings, stating the market value of the properties covered by each of the mortgages to Investors Syndicate as being less than the outstanding indebtedness thereon, and further stating that the upkeep and maintenance of said apartment buildings has been badly neglected, that they are in bad state of repair and are in need of immediate repairs.

Likewise attached to said petition, designated Exhibit "B" and made a part thereof, is a copy of assignment of rents covering the property referred to as Chapman Courts, dated November 20, 1926, but in form containing the same provisions as the assignment of rents held by Investors Syndicate as additional security on the apartments known as Rest Haven, dated June 29, 1926, and the Nordell, dated June 30, 1926. All of said assignments of rents contained the following provisions:

"Now, therefore, in consideration of the premises and in consideration of One Dollar (\$1.00) to the undersigned in hand paid by the Investors Syndicate, the undersigned does assign and set over to the Investors Syndicate, all its rights, title and interest in and to the rents and profits and income of whatsoever nature, due or to become due, from the property hereinabove described, or any buildings or building thereon situated, to have and to hold, unto the said Investors Syndicate, its successors and assigns, so long as the said mortgage indebtedness hereinabove described and any interest accruing thereon shall remain unpaid, it being understood, however, that so long as said mortgage shall be in good standing, and so long as each and every covenant of said mortgage shall have been complied with, the said Mortgagor, the undersigned, shall have the control and management of said property and shall be allowed to collect and disburse any and all rents and

profits accruing from said property, without accounting to the Mortgagee, it being intended by the parties that this assignment shall automatically become operative upon any default or delinquency on the part of the Mortgagor under the terms and conditions of said mortgage, and that upon any such default or delinquency, the said mortgagee shall be and hereby is, authorized and empowered without notice to exercise the rights and privileges in this assignment contained, and to apply any and all sums so collected toward the payment of said mortgage indebtedness, interest and costs and expenses of collection so long as any of such sums shall remain due and unpaid. The Assignee herein is hereby authorized and empowered, in the event of any delinquency as above set out, to place a manager of its own selection in charge of said property to collect all rents and pay out of the proceeds of said rents a reasonable compensation to said manager and to continue said manager in possession and control so long as said mortgage shall be in default." [34]

The mortgage on the Nordell Apartments was made, executed and delivered by J. C. Meyers, Inc., to Western Bond & Mortgage Company, under date of March 10, 1926, to secure a loan for \$26,000.00, with interest at 7% payable \$260.00 per month beginning August 10, 1926. The mortgage covers Lot 14, Block 11, Kings Second Addition to Portland, Multnomah County, Oregon, with provision

for acceleration in case of default. The mortgage contains the following clauses:

“The mortgagor, in order to secure the payment to the mortgagee of a debt of \$26,000.00 and interest and all other sums as provided herein, and the performance of all covenants herein contained, does hereby grant and convey to the mortgagee that certain real property, situate in the County of Multnomah, State of Oregon and described as follows, to wit * * * together with the issues, rents and profits therefrom.

“The Mortgagor herein does hereby authorize and empower the said Mortgagee, its successors and assigns, and their agents and attorneys, at their election, without notice to the Mortgagor, to take and maintain full control of said premises and receive all rents and income therefrom and issue receipts therefor, and out of the amount or amounts received therefrom to retain or pay the customary charges for managing said property, pay the necessary repairs as determined by said Mortgagee, its successors and assigns, agents and attorneys, pay the taxes and assessments repaid thereon, pay the premium on insurance policies now thereon or any renewals thereof, and pay the Mortgagee and its successors in interest any amounts due on this mortgage, and to pay the balance of any amount so collected to the then owner of the property, and in so doing those exercising this right shall

be liable only for the amount or amounts collected by them, less the necessary cost of making collections; however, such rights of collection of rents or income and to take and maintain control of said property under this authorization shall not apply so long as the payments and covenants required by this mortgage are not in default, and such control of said property under this authorization shall cease and be of no further force and effect.

* * * * *

“And the said Mortgagee, its successors, legal representatives or assigns, shall be at liberty, immediately after any default in the payment of the principal sum mentioned in said note or of any settlement thereof, or of the interest which shall accrue thereon or any part of either at the respective times therein specified for the payment thereof, upon a complaint filed or any other proper legal proceeding being commenced for the foreclosure of this mortgage, to apply for, and the said mortgagee shall be entitled as a matter of right without consideration of the value of the mortgaged premises as security for the amounts due the Mortgagee, or the solvency of any person or persons bound for the payment of such amounts to the appointment by any competent court, without notice to any owner, lessee, or other party of a receiver to take possession of the premises and/or to col-

lect the rents, issues and profits of the said premises with the power to lease the said premises, or such part thereof as may not then be under lease, and with such other powers as may be deemed necessary, who after [35] deductions of all proper charges and expenses attending the execution of the said trust as received, shall apply the residue of the said rents and profits to the payment and satisfaction of the amount remaining secured hereby, or to any deficiency which may exist after applying the proceeds of the sale of the said premises to the payment of the amount due, including interest and the costs and a reasonable attorney's fee for the foreclosure and sale."

An assignment of rents was executed and delivered by said mortgagor to said mortgagee, as hereinbefore more particularly set forth dated June 30, 1926. Said mortgage was thereafter assigned to Investors Syndicate, to-wit, on April 6, 1936, and then duly recorded.

The mortgage on Rest Haven Apartments covers Lot 10, Block 2, Goldsmith's Addition, Portland, Multnomah County, Oregon, and secures the payment of a promissory note in the principal amount of \$28,500.00 with interest at the rate of 7% per annum, payable in monthly installments of \$285.00 on the 15th day of each month beginning October 15, 1926, with acceleration clause, from the same mortgagor to the same mortgagee, and including

the same provision as heretofore quoted with reference to the Nordell Apartments and likewise, with assignment of rents as before described, dated June 29th, 1926, which mortgage was duly assigned to said petitioner and which assignment was duly recorded on May 28, 1926.

The mortgage on Chapman Court Apartments covers Lot 1, 2, 6, 7 and 10, Block 22, Goldsmith's Addition, recorded in Book 1201, page 123, from J. C. Meyers Inc., as mortgagor, to Investors Syndicate, as mortgagee. This mortgage secured a note in the amount of \$50,000.00 with interest at the rate of 7%, payable \$500.00 per month beginning May 20, 1927, with acceleration clause, and including the same provisions as hereinbefore quoted with reference to the Nordell Apartments, and likewise with an assignment of rents as heretofore described, dated November 20, 1926.

Said petition of Investors Syndicate also covered mortgages on duplexes adjoining Chapman Court. One mortgage was given to J. C. Meyers, Inc., mortgagor, to Investors Syndicate, mortgagee, covering Lot 14, Block 22, Goldsmith's Addition, and secured a promissory note in the amount of \$5,000.00 with interest at the rate of 7% per annum, payable \$50.00 per month beginning July 7, 1927, with acceleration clauses and containing identical clauses hereinbefore quoted with reference to Nordell Apartments, including assignment of rents.

The other mortgage was between the same parties covering Lot Eleven, [36] Block 22, Goldsmith's

Addition, and secured a promissory note in the amount of \$5,000.00 with interest at the rate of 7% per annum, payable \$50.00 per month beginning July 7, 1927, with acceleration clause, and likewise containing the identical clauses quoted with reference to Nordell Apartments, including also assignment of rents.

All of these mortgages were duly and promptly recorded.

All the foregoing petitions were referred to Roy F. Shields, Special Master, to determine all questions of fact and the law involved therein and to report the same to the court.

On November 8, 1934, a hearing was had before said Special Master on the said petitions of Investors Syndicate and Metropolitan Life Insurance Company. At this hearing, the Petitioning and Intervening Creditors and the debtor were represented by counsel, and it was stipulated and agreed that all of the allegations of said petitions were true excepting the allegations as to value of the mortgaged properties contained in the petition of Investors Syndicate, and evidence was received upon that issue. On March 29, 1935, a further hearing was had before said Special Master on the said petition of Portland Trust and Savings Bank. At this hearing Petitioning and Intervening Creditors and the debtor were represented by counsel and it was stipulated and agreed that all of the allegations of the petition of Portland Trust and Sav-

ings Bank were true, and no evidence was taken thereon.

On April 23, 1935, Roy F. Shields as such Special Master filed in said bankruptcy proceedings a report (not the report reviewed by the court which resulted in the order appealed from) in which he found that the allegations of the petitions of Investors Syndicate, Metropolitan Life Insurance Company and Portland Trust and Savings Bank, Trustee, were true and recommended that Investors Syndicate and Metropolitan Life Insurance Company be permitted to foreclose their mortgages and that John W. Kaste be required to pay to the Trustee in Bankruptcy the rentals derived from the Adele Manor and Charmaine Apartments which were in his possession, and that the net proceeds of rentals received from each mortgaged property, after deducting a fair proportion of the expense of handling the same in said proceedings, be paid to the mortgagee [37] holding the mortgage on such property and applied toward the payment of the mortgage debt. No order was made confirming said report, but thereafter orders were made permitting Investors Syndicate and Metropolitan Life Insurance Company to foreclose their mortgages and requiring Kaste to pay over said rentals to the Trustee in Bankruptcy, as elsewhere shown herein.

On May 21, 1935, Metropolitan Life Insurance Company filed in the bankruptcy proceedings, motion for leave to foreclose its said mortgage, in a

court other than the bankruptcy court, and on June 13, 1935, the court entered an order granting said company leave to proceed with the foreclosure of its mortgage, on condition, however, that no final decree should be entered in said foreclosure proceedings until permission should be granted by further order of the Bankruptcy Court.

On June 3, 1935, Investors Syndicate filed in said bankruptcy proceedings, motion for leave to foreclose its said mortgages, in a court other than the bankruptcy court, and on June 11, 1935, the court made an order granting to Investors Syndicate the right to proceed with the foreclosure of its said mortgages, with the same conditions above recited.

On June 5, 1935, Portland Trust and Savings Bank, Trustee, filed in said bankruptcy proceedings, motion and affidavit for order permitting it to proceed with the suits pending in the State Court for the foreclosure of its said mortgages.

On the 9th day of October, 1935, the Court made an order reciting that reorganization of Guaranty Trust Company and National Investment Company could not be effected under the provisions of Section 77B of the Bankruptcy Act, and that Guaranty Trust Company is now and was insolvent on and for some time prior to November 1, 1933, and that the assets of said corporation and National Investment Company should be liquidated by a Trustee, and appointing H. E. Eakin as such trustee, with authority to take possession of all of the assets

and property of said corporations and to manage, operate and control the same, and further providing:

“And, it is further ordered that said Trustee shall keep accounts of all moneys coming into his possession from each of the several properties of the debtors, and that [38] the Trustee’s accounts shall be so kept that all income and revenues received and expenses incurred in the operation of all of said properties can at all times be ascertained and segregated.”

On the 20th day of November, 1935, the Court made an order entitled “Order of Reference as to Ownership of Rents”, which is as follows:

“[Title of Court and Cause.]

ORDER OF REFERENCE AS TO
OWNERSHIP OF RENTS

“Whereas Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, and other mortgagees, have asserted claim to the moneys now in the hands of the trustee of the above entitled bankrupt estates representing rents collected from properties covered by mortgages now in the hands of the trustee, and

“Whereas H. E. Eakin, trustee of the above entitled bankrupt estate, claims to be the owner of the said funds and that the same are a part of the trust estate available for the pay-

ment of expenses of administration and for distribution among creditors, and

“Whereas the said H. E. Eakin, trustee of the above entitled estate, was not a party to any of the proceedings heretofore had before the Special Master, and

“Whereas it is necessary that these issues be determined, it is

“Ordered that the aforesaid issues be and the same hereby are referred to Roy F. Shields, Esq., as Special Master, to take testimony thereon and hear legal arguments thereon and to make to this court his findings of fact and his recommendations of law thereon, and said Special Master shall consider the testimony taken in prior hearing as to claims of Investors Syndicate, Portland Trust & Savings Bank Trustee and Metropolitan Life Insurance Company and as to such parties this reference shall be considered a rehearing before such Special Master.

Dated November 20, 1935.

(s) JOHN H. McNARY

Judge”

In addition to the foreclosure proceedings hereinbefore described as to Portland Trust and Savings Bank, foreclosure proceedings were, subsequent [39] to orders granting leave to foreclose, as hereinbefore set forth, instituted by Metropolitan Life Insurance Company in the Circuit Court of Multno-

mah County, Oregon, and by Investors Syndicate in the District Court of the United States for the District of Oregon, covering their mortgages herein described. Such foreclosure suits were pending at the time of the hearing on November 20, 1935. None of the appellants at any time had possession of the real property covered by any of the mortgages nor were any of the mortgages of the appellants herein foreclosed or liquidated in the bankruptcy tribunal, nor a receiver appointed. No applications or petitions relating to the questions involved in this appeal were addressed by any of the appellants to the Bankruptcy Court or to the Trustee in Bankruptcy, other than as specifically mentioned in this agreed statement.

It was stipulated at the hearing that the facts set forth as allegations in the petitions of each of the mortgagees, appellants herein, are true, also that the condition of all the mortgages remained unchanged as of the date of the hearing, with the exception of added delinquent installments and added taxes, no payments having been made on any of said mortgages in the interim.

Statements of amounts due and unpaid as of January 1, 1936, on mortgages to Investors Syndicate, disclosed the total indebtedness as of January 1, 1936, exclusive of costs and attorney fees in the respective suits, and unpaid taxes in the following amounts:

	Total Indebtedness	Unpaid Taxes
Nordell Apartments	\$24,638.55	\$2098.75
Resthaven Apartments	26,856.11	2070.01
Chapman Courts	50,603.59	3682.79
Duplex (1st)	5,016.87	456.97
Duplex (2nd)	5,016.87	456.97

Investors Syndicate was limited entirely to its security, as the mortgagor corporation was dissolved in 1927 and the individual signers of the note were outside the state.

The amounts due on the mortgages of Portland Trust and Savings Bank as of the approximate date of the hearing were as follows: [40]

Charmaine Apartment statement amount owing on mortgage:

Principal balance	\$47,000.00
Interest 7% from Oct. 11, 1932 to Nov. 20, 1935	10,198.25
Insurance advanced July 17, 1935	422.00
Interest to Nov. 20, 1935	12.12
Abstract continuation	32.00
Photo. cop.	19.77
	<hr/>
Total	\$57,684.14
Taxes unpaid	
1930 taxes	\$1006.96
1931 taxes	924.76
1932 taxes	946.69
1933-34 taxes	935.50
1935 taxes	907.25

Statement of amount due on Adele Manor mortgage:

Principal balance	\$48,500.00
Interest 7% from Dec. 5, 1932 to Nov. 25, 1935	10,090.58
Insurance premium advanced	1,040.00
Interest from May 22, 1932, to Nov. 25, 1935	258.25
Insurance premium	323.63
Interest from July 18, 1935, to Nov. 25, 1935	8.44
Abstract continuation	25.00
Blue prints	21.36
	<hr/>
Total	\$60,267.26

Taxes unpaid	
1930 taxes	\$990.53
1931 taxes	909.44
1932 taxes	931.00
1933-34 taxes	892.00
1935 taxes	815.43

The amount due on the Metropolitan Life Insurance Company's mortgage, to-wit, Maravilla Apartments, as of the approximate date of the hearing was as follows:

Principal balance	\$22,355.97
Interest 6% from May 3, 1933, to Novem- ber 25, 1935	3,434.80
Taxes advanced	1,936.44
Interest on taxes advanced at 6%	114.86
	<hr/>
Total	\$27,842.07

As to the properties of all the appellants, taxes were delinquent since 1929, excepting insofar as taxes were advanced by the [41] mortgagee, as above set forth.

The debtors herein were both insolvent at the time these bankruptcy proceedings were commenced. The involuntary petition was resisted by the debtors' counsel in the hope that Section 77B would be enacted by Congress, and accordingly counsel admitted at the hearing that he "stalled" the proceedings until June, when Section 77B became part of the Bankruptcy Law. The reorganization plan was then filed as part of the answer of the debtor, wherein it was proposed that the mortgagees scale the principal of their mortgages down 25% and also reduce the rate of interest. Such proposal was immediately and at all times thereafter unacceptable to the mortgagees. Therefore, it became evident to John W. Kaste, general counsel for the debtor and attorney of record herein, that the proceedings were hopeless. The debtor, however, employed additional counsel in the hope that they might be able to persuade the mortgagees to cut down their balances, but it was finally determined that the reorganization was hopeless and an order of liquidation was entered as hereinbefore set forth.

At the hearing before the Special Master on the petitions of the appellants, uncontradicted evidence was received that: The mortgages in question were delinquent as to taxes and interest, most of which ran back to 1929; the income from the mortgaged

properties, for a considerable period prior to bankruptcy, had not been used to pay taxes, interest, or other charges, against the properties, but instead had been used for general purposes of the Debtor; that the debtor ran itself before bankruptcy proceedings by using such income instead of applying the same towards the payment of interest and taxes, and such income was practically all the income that the two debtor corporations had; that during the administration of the trustees in the bankruptcy proceedings the debtors were in a state of total collapse, having virtually no income except from the mortgaged properties; that fire insurance was not maintained on the mortgaged properties, and no repairs were made except those necessary to make the rooms habitable; and that the condition of the debtors became worse as the bankruptcy proceedings continued. Also, as to each of the appellants' mortgages, two or more [42] experienced and qualified appraisers who were familiar with the mortgaged premises testified without contradiction as to the value at that time of each of the mortgaged properties. Such valuations in all cases were less than the amounts due under the terms of the mortgages.

The appellees contend that no findings were made by the Special Master on the testimony contained in foregoing paragraph. All parties to this appeal reserve their rights on such issue, the Special Master's report being quoted in full herein insofar as it relates to the questions involved in this appeal.

The Trustee at the hearing filed his accounts of the rentals collected at that time from each of the mortgaged properties, but such figures are not here presented inasmuch as, in the event of reversal of the lower court's order, a further accounting will be necessary in any event as to rentals collected after the date of the hearing before the Special Master on the mortgagees' petitions here involved.

It was stipulated at the hearing before the Special Master that all of the records on file in the bankruptcy proceedings may be considered in evidence to the extent that the Special Master and the Court could take notice of them, without their being introduced.

Under date of December 18, 1935, appellants herein duly served and filed herein a joint motion and petition for an order requiring the Trustee to segregate and hold in a separate account all moneys received from the properties against which appellants held mortgages, and to make no disbursements from said moneys for any purpose except general expenses for the operation of said mortgaged properties, without first obtaining an order of court. In support of said motion and petition it was alleged that at all times since September 10, 1934, said mortgaged premises had been in the possession and under the control of C. W. Twining, as Trustee, and his successor, H. E. Eakin, and that the said Trustees had collected all rents and profits from said mortgaged premises; that said mortgagees had filed applications for orders directing the Trustee to

segregate in the name of the mortgagees for application upon their respective mortgages all the rents, [43] issues and profits derived from said mortgaged premises; that said applications had been referred to Roy F. Shields for hearing and determination, and were still under consideration by him as Special Master; that said mortgagees claimed a first and prior lien against all the rents, issues and profits from their respective mortgaged properties, less the proper and necessary operating charges that may be allowed and fixed by the Court. No reference or hearing was had, or order entered on such petition.

From time to time herein accounts have been filed by the Trustee showing rents, issues and profits received by him and expenditures made by him as to each of the mortgaged properties, such detail not being given here for the reasons aforesaid.

All rents involved in this proceeding were collected or received subsequent to the filing of the involuntary petition in bankruptcy herein.

On November 14, 1936, Roy F. Shields as Special Master, filed in said proceedings his Special Master's report which, insofar as it relates to claims of the appellants to the rents and profits derived from their respective mortgaged properties, is as follows: [44]

[Title of Court and Cause.]

REPORT OF SPECIAL MASTER ON PETITIONS OF MORTGAGEES TO HAVE TURNED OVER TO THEM THE RENTS FROM MORTGAGED PROPERTIES.

I. Mortgages Held by Investors Syndicate.

Investors Syndicate, a Minnesota corporation, holds mortgages on properties of the Debtors as follows:

1. Nordell Apartments.

On March 10, 1926, J. C. Meyers, Incorporated, being then the owner of Lot 14, Block 11, King's Second Addition to Portland, Oregon, executed to Western Bond and Mortgage Company, an Oregon corporation, a mortgage covering said property, "together with the issues, rents and profits therefrom", to secure payment of a note in the sum of \$26,000 and interest thereon at 7% per annum, payable in monthly installments of \$260 on the 10th day of each month, beginning August 10, 1926. This mortgage was recorded on March 11, 1926, in Book 1128 at page 44 et seq., Mortgage Records for Multnomah County, Oregon. The mortgage contained covenants which required the mortgagor and its successors to pay promptly all taxes, assessments, liens or other charges that should be levied against the premises, and contained the usual covenants obligating the mortgagor to maintain insurance on the property. It also provided that [45]

"The Mortgagor herein does hereby authorize and empower the said Mortgagee its suc-

cessors and assigns and their agents and attorneys, at their election, without notice to the Mortgagor, to take and maintain full control of said premises and receive all rents and income therefrom and issue receipts therefor, and out of the amount or amounts received therefrom to retain or pay the customary charges for managing said property, pay the necessary repairs as determined by said Mortgagee, its successors and assigns, agents and attorneys, pay the taxes and assessments levied thereon, pay the premium on insurance policies now thereon or any renewals thereof, and pay the Mortgagee and its successors in interest any amounts due on this mortgage, and to pay the balance of any amount so collected to the then owner of the property, and in so doing those exercising this right shall be liable only for the amount or amounts collected by them less the necessary cost of making collections; however, such rights of collection of rents or income and to take and maintain control of said property under this authorization shall not apply so long as the payment and covenants required by this mortgage are not in default, and such control of said property under this authorization shall cease upon the removal of the default or other cause for such control until default shall again arise, and when the debt secured by this mortgage shall have been fully paid, then this authorization shall cease and be of no further force and effect."

The mortgage contained this further provision :

“And the said Mortgagee, its successors, legal representatives or assigns, shall be at liberty immediately after any default in the payment of the principal sum mentioned in the said note or of any installment thereof, or of the interest which shall accrue thereon or of any part of either at the respective times therein specified for the payment thereof, upon a complaint filed or any other proper legal proceeding being commenced for the foreclosure of this mortgage, to apply for, and the said Mortgagee shall be entitled as a matter of right without consideration of the value of the mortgaged premises as security for the amounts due the Mortgagee, or the solvency of any person or persons bound for the payment of such amounts to the appointment by any competent Court, without notice to any owner, lessee, or other party of a Receiver to take possession of the premises and/or to collect the rents, issues and profits of the said premises with the power to lease the said premises, or such part thereof as may not then be under lease, and with such other powers as may be deemed necessary, who, after deduction of all proper charges and expenses attending the execution of the said trust as received, shall apply the residue of the said rents and profits to the payment and satisfaction of the amount remaining secured hereby or to any deficiency which may exist after applying the

proceeds of the sale of the said premises to the payment of the amount due, including interest and the costs and a reasonable attorney's fee for the foreclosure and sale." [46]

Under date of June 30, 1926, J. C. Meyers, Incorporated, executed to said Western Bond and Mortgage Company an assignment as follows:

"Know All Men By These Presents; That Whereas, J. C. Meyers, Inc., an Oregon corporation, hereinafter called the undersigned, has heretofore given unto the Western Bond and Mortgage Company, its certain mortgage in the amount of Twenty-Six Thousand and No/100 (\$26,000.00) Dollars, to secure the payment of a certain note in said amount, which mortgage covers;

Lot Fourteen (14) Block Eleven (11) King's Second Addition in the City of Portland County of Multnomah and State of Oregon,

Whereas, said loan was granted by the said Mortgagee on condition that the said Mortgagor further secures the payment of said principal sum and interest to become due thereon, by the assignment of the rents and profits accruing from the above described property and the building thereon,

Now Therefore, in consideration of the premises and in consideration of One Dollar (\$1.00) to the undersigned in hand paid by the Western Bond and Mortgage Company, the

undersigned does hereby assign and set over to the Western Bond and Mortgage Company, all its rights, title and interest in and to the rents and profits and income of whatsoever nature, due or to become due, from the property hereinabove described, or any buildings or building thereon situated, to have and to hold, until the said Western Bond and Mortgage Company, its successors and assigns, so long as the said mortgage indebtedness hereinabove described and any interest accruing thereon shall remain unpaid, it being understood, however, that so long as said mortgage shall be in good standing, and so long as each and every covenant of said mortgage shall have been complied with, the said Mortgagor, the undersigned, shall have the control and management of said property and shall be allowed to collect and disburse any and all rents and profits accruing from said property, without accounting to the Mortgagee, it being the intention of parties that this assignment shall automatically become operative upon any default or delinquency on the part of the Mortgagor under the terms and conditions of said mortgage, and that upon any such default or delinquency, the said Mortgagee shall be and hereby is, authorized and empowered without notice to exercise the rights and privileges in this assignment contained, and to apply any and all sums so collected toward the payment of said mortgage indebtedness, interest

and costs and expenses of collection so long as any of said sums shall remain due and unpaid. The Assignee herein is hereby authorized and empowered, in the event of any delinquency as above set out, to place a manager of its own selection in charge of said property to collect all rents and pay out of the proceeds of said rents a reasonable [47] compensation to said manager and to continue said manager in possession and control so long as said mortgage shall be in default."

After the execution of said mortgage, and prior to January 1, 1934, said mortgaged premises were conveyed to National Investment Corporation, one of the Debtors herein, and the mortgage was transferred for value to Investors Syndicate.

There is and has been for many years located upon said Lot 14, Block 11, King's Second Addition, a two story brick veneer building used as an apartment house and known as Nordell Apartments. It contains 17 apartments, of which one consists of 4 rooms and 16 consist of 2 rooms. It is equipped with an old type Frigidaire refrigeration and is heated by an oil burner.

During recent years, maintenance of the building has been neglected and the interior walls are in a bad state of repair. Taxes for the years 1931 to 1935 in the amount of \$2098.75 were paid by Investors Syndicate after the owner failed to pay them. Insurance premiums have been paid by Investors Syndicate to protect its security. As of October 1,

1934, principal and interest on the mortgage indebtedness, in the amount of \$22,708.30 was due and unpaid. At that time the fair market value of the property was approximately \$27,500.00.

2. Resthaven Apartments.

On May 16, 1926, J. C. Meyers, Inc., being then the owner of Lot 10, Block 2, Goldsmith's Addition to the City of Portland, Oregon, executed to Western Bond and Mortgage Company a mortgage covering said property "together with the issues, rents and profits therefrom" to secure the payment of a loan of \$28,500 and interest thereon at 7% per annum, payable in monthly installments of \$285 on the 15th day of each month, beginning October 15, 1926. The mortgage was recorded May 25, 1926, in Book 1143, at pages 223 et seq, Mortgage Records for Multnomah County, Oregon. The mortgage contained covenants identical with those in the mortgage covering the Nordell Apartment [48] property, as set out above. Under date of June 29, 1926, J. C. Meyers, Inc., executed to said Western Bond and Mortgage Company an assignment of the rents and income from this property, which was of the same tenor as the above quoted assignment dated June 30, 1926, pertaining to the rents and income from the Nordell Apartments.

After the execution of the mortgage, and prior to January 1, 1934, the mortgaged property was conveyed to National Investment Corporation, and the mortgage was assigned and transferred for value to Investors Syndicate.

For many years there has been and is now located on the mortgaged property a two-story brick veneer building used as an apartment house and known as Resthaven Apartments.

It contains 18 apartments (exclusive of a manager's apartment), of which 2 consist of three rooms and 16 consist of 2 rooms. Maintenance of the building has been neglected and it is in a bad state of repair. Taxes for the years 1931 to 1935, inclusive, in the amount of \$2,070.01 were paid by Investors Syndicate, the Debtor having failed to pay them. Investors Syndicate has been required also to maintain insurance on the property to protect its security. As of October 1, 1934, principal and interest on the mortgage indebtedness in the amount of \$25,032.93 was due and unpaid. At that time, the market value of the property was approximately \$27,500.

3. Chapman Court Apartment.

On November 10, 1926, J. C. Meyers, Inc., being then the owner of Lots numbered 1, 2, 6, 7 and 10 in Block 22, Goldsmith's Addition to the City of Portland, Oregon, executed to Investors Syndicate a mortgage covering said property "together with the issues, rents and profits therefrom" to secure the payment of a promissory note of \$50,000.00 and interest thereon at 7% per annum, payable in monthly installments of [49] \$500.00 on the 20th day of each month, beginning May 20, 1927. This mortgage was recorded on December 9, 1926, in Book 1148, at pages 328 et seq, Record of Mortgages for Mult-

nomah County, Oregon. The Mortgage contained covenants identical with those in the mortgage covering the Nordell Apartment property as set forth above.

Under date of November 20, 1926, said J. C. Meyers, Inc., executed to said Investors Syndicate an assignment of the rents and income from the mortgaged property, the assignment being of the same tenor as the one hereinabove quoted, dated June 30, 1926, assigning the rents and incomes from the Nordell Apartment property. After the execution of said mortgage and prior to June 1, 1934, said mortgaged property was conveyed to National Investment Corporation.

There is located on this property bungalow type court buildings of brick veneer, consisting of five one-story buildings, which have been known as the Chapman Court Apartments. It contains 25 apartments, of which 8 consist of 3 rooms, 16 consist of 2 rooms and 1 has four rooms. Composition shingles on the roof are curled and not water tight, and the building generally is in a bad state of repair.

As of October 1, 1934, there was due and unpaid on this mortgage principal and interest in the sum of \$46,870.21. Taxes for the years 1931 to 1935, inclusive, in the amount of \$3,682.79 were paid by Investors Syndicate, after the owner failed to pay them. Investors Syndicate has been required also to pay the insurance premiums to protect its security.

I find that as of October 1, 1934, the market value of this property was approximately \$47,000.

4. Duplex Apartments. (First)

On March 7, 1927, J. C. Meyers, Inc., being then the owner of Lot 14, Block 22, [50] Goldsmith's Addition to the City of Portland, Oregon, executed to Investors Syndicate a mortgage covering said property "together with the issues, rents and profits therefrom" to secure the payment of a loan of \$5,000.00 and interest thereon at the rate of 7% per annum, payable in monthly installments of \$50.00 on the 7th day of each month, beginning July 7, 1927. This mortgage was recorded on March 8, 1927, in Book 1221, at pages 339 et seq., Mortgage Records of Multnomah County, Oregon. The mortgage contained covenants identical with those in the mortgage covering the Nordell Apartment property. No separate assignment of the rents and incomes from this property was made to secure the payment of the mortgage debt. After the execution of the mortgage and prior to January 1, 1934, said mortgaged property was conveyed to National Investment corporation.

There is located on this property a frame duplex apartment building, containing twelve rooms segregated into two apartments, one consisting of 8 rooms and the other of 4 rooms. For want of repainting, the exterior walls have worn down to the wood siding, and the building is in need of repairs.

As of October 1, 1934, there was due and unpaid principal and interest accruing on this mortgage in the sum of \$4,663.81. Taxes for the years 1931 to 1935, inclusive, in the amount of \$456.97 were

paid by Investors Syndicate, the owner having failed to pay them. Investors Syndicate has been required also to pay insurance premiums to protect its security.

I find that as of October 1, 1934, the market value of this property was approximately \$5,000.00.

5. Duplex Apartment. (Second)

On March 22, 1927, J. C. Meyers, Inc., being then the owner of Lot 11, in Block 22, Goldsmith's Addition to the City of Portland, Oregon, executed to Investors Syndicate a mortgage covering said property "together with the issues, rents and profits therefrom" to secure [51] the payment of a loan of \$5,000.00 and interest thereon at the rate of 7% per annum, payable in monthly installments of \$50.00 on the 22nd day of each month beginning July 22, 1927. This mortgage was recorded on March 24, 1927, in Book 1234, at pages 146 et seq., Mortgage Records for Multnomah County, Oregon. The mortgage contained covenants identical with those in the mortgage covering the Nordell Apartment property. No separate assignment of the rents and incomes from this property was made to secure the mortgage debt. After the execution of said mortgage and prior to January 1, 1934, said mortgaged property was conveyed to National Investment Corporation.

There is located upon this property a frame duplex apartment building, segregated into two apartments, one consisting of 8 rooms and one of 4 rooms. Maintenance of this building, and particularly the painting of it, has been neglected.

As of October 1, 1934, there was due and unpaid

principal and interest accruing on this mortgage in the sum of \$4,666.47. Taxes for the years 1931 to 1935, inclusive, in the amount of \$456.97 were paid by Investors Syndicate, after the owner failed to pay them. Investors Syndicate has been required also to pay the insurance premiums to protect its security.

I find that as of October 1, 1934, the market value of this property was approximately the sum of \$5,000.

On September 10, 1934, the court appointed a trustee to take possession and control of the debtor's property. On September 14, 1934, the trustee took possession of the properties above mentioned and thereafter collected the rents from them. On October 29, 1934, Investors Syndicate filed in this cause its petition setting out the facts with respect to the mortgages held by it on the Nordell, the Resthaven, Chapman Court and the two duplex apartment properties above mentioned, alleging that the amounts [52] of the respective mortgage debts were substantially equal to the then value of the mortgaged properties, respectively, and that the properties were being neglected and depreciating in value, and praying that Investors Syndicate be permitted to institute suit for the foreclosure of said mortgages, and praying further that the trustee be directed to collect and segregate for the benefit of Investors Syndicate the rents, issues and profits from the mortgaged properties. At the same time Investors Syndicate filed a motion for an order in conformity with the prayer of its petition. The petition

was verified, and there was attached to it an affidavit setting forth the value of each property and its physical condition. Permission to foreclose was granted and in July, 1935, Investors Syndicate instituted suits for the foreclosure of each of the mortgages held by it as above set forth.

J. C. Meyers, Inc., the maker of each of the mortgages held by Investors Syndicate, was dissolved on July 5, 1927, and it has no assets and is no longer in existence. Some of the notes held by Investors Syndicate were signed or endorsed by J. C. Meyers and wife, individually, but for several years neither of them has resided in the State of Oregon and personal service of process on them could not be obtained. National Investment Company, on acquiring the several properties as aforesaid, did not assume the personal indebtedness of the makers of the notes. For the reasons stated, Investors Syndicate's recourse for the collection of the amounts due on the mortgages held by it is confined to the mortgaged properties. [53]

II. Mortgages Held by Portland Trust & Savings Bank.

1. Adele Manor.

On March 30, 1928, Harry Mittleman and Helen R. Mittleman, husband and wife, being then the owners of Lots 30 and 34, Cedar Hill, in the City of Portland, Oregon, executed to Portland Trust and Savings Bank a mortgage covering said property to secure the payment of 79 promissory notes, ag-

gregating the principal sum of \$52,500.00, with interest thereon at the rate of 7% per annum. The several notes, each in the amount of \$500.00, were made to mature on various dates beginning March 28, 1930, and ending March 28, 1938. The mortgage was recorded April 2, 1928, in Book 1320, at pages 261 et seq., Mortgage Records for Multnomah County, Oregon. The mortgage contained the following covenant:

“As a part of the security for the sums due and to become due the Mortgagee hereunder, the Mortgagor/s do/does hereby convey and assign all of the rent, issues and profits of the mortgaged property above described from and after default by the Mortgagor/s in the payment of any sum or sums due hereunder, or any other terms of this mortgage, and in any suit, action or proceeding to foreclose this mortgage, the court may, on motion of the party of the second part, or its assigns, and without notice, appoint a receiver to collect the rents and profits issuing out of said premises during pendency of such foreclosure and until the right of redemption expired, and such rents and profits shall, after payment of all necessary expenses, be applied in payment, pro tanto, of the amounts due under this mortgage.”

After the execution of the mortgage and prior to January 1, 1934, the mortgaged property was transferred by mesne conveyances to Guaranty Trust Company, which assumed the mortgage debt. There

is due and unpaid on the mortgage indebtedness the principal sum of \$48,500.00 and several years' interest.

There is located upon said mortgaged property, an apartment house building known as the Adele Manor, and the apartments therein have been rented and produced income. [54]

On July 2, 1933, Portland Trust and Savings Bank instituted in the Circuit Court of the State of Oregon for Multnomah County a suit for the foreclosure of its said mortgage (Portland Trust and Savings Bank, a corporation, trustee, plaintiff, v. Harry Mittleman, et al, defendants, No. 110661), and moved the court for the appointment of a receiver to take charge and possession of the mortgaged premises and to collect the rents, issues and profits therefrom and apply the same in accordance with the order of the court. The motion came on for hearing on August 10, 1933, and thereupon the court, in lieu of appointing a receiver as requested, entered an order directing Guaranty Trust Company to file in said court each month during the pendency of said suit, verified accounts showing all money received and all disbursements made in the operation of said apartment house and to pay the net income from the property into court to be applied as the court later should direct. Afterward, said order was modified whereby the Guaranty Trust Company was permitted to retain from the net monthly rentals received from the mortgaged property an amount equal to 20% thereof as compensa-

tion for the use of furniture and fixtures in the apartment house belonging to Guaranty Trust Company and not covered by said mortgage. Pursuant to said orders of the Circuit Court, Guaranty Trust Company or its attorney, John W. Kaste, filed monthly reports of the net income from said property as required by said orders and paid such net income into the Circuit Court for the period August 1, 1933, up to and including May 11, 1934. Such net rental and income for the period subsequent to May 11, 1934, was collected by said John W. Kaste and retained by him until after the appointment of C. W. Twining as trustee in this proceeding. Thereafter said John W. Kaste, upon the order of this court, paid the accumulated net income and rental in his hands to said C. W. Twining as trustee. From that time on such net rentals and income have been received by the trustee in this [55] proceeding.

2. Charmaine Apartments.

On July 17, 1928, Harry Mittleman and Helen R. Mittleman, husband and wife, being then the owners of Lot 29, and 35, Cedar Hill, in the City of Portland, Oregon, executed to Portland Trust and Savings Bank, as trustee, a mortgage on said property to secure the payment of 71 promissory notes aggregating in principal the sum of \$50,000.00 and interest thereon at 7% per annum. These notes, each in the sum of \$500.00, were to mature serially on various dates beginning July 17, 1930, and ending July 17, 1938. This mortgage was recorded July 18,

1928, in Book 1345 at pages 209, et seq., Mortgage Records for Multnomah County Oregon. The mortgage contained the following covenant:

“As a part of the security for the sums due and to become due the Mortgagee hereunder, the mortgagor/s do/does hereby convey and assign all the rent, issues and profits of the mortgaged property above described from and after default by the Mortgagor/s in the payment of any sum or sums due hereunder, or any other terms of this mortgage, and in any suit, action or proceeding to foreclose this mortgage, the court may, on motion of the party of the second part, or its assigns, and without notice, appoint a receiver to collect the rents and profits issuing out of said premises during pendency of such foreclosure and until the right of redemption expires, and such rents and profits shall, after payment of all necessary expenses, be applied in payment, pro tanto, of the amounts due under this mortgage.”

There is due and unpaid on this mortgage principal in the sum of \$47,000.00 with several years' interest. After the execution of said mortgage and prior to January 1, 1932, the mortgaged property was conveyed by mesne conveyances to Guaranty Trust Company, which assumed the mortgage debt.

There is located upon said property an apartment house, known as the Charmaine Apartments, and the apartments therein have been rented.

On July 2, 1933, Portland Trust and Savings Bank [56] instituted in the Circuit Court of the State of Oregon for Multnomah County, a suit to foreclose said mortgage (Portland Trust and Savings Bank, trustee, a corporation, plaintiff, v. Harry Mittleman, et al, defendants, No. 110662) and moved the court for the appointment of a receiver to take charge and possession of the mortgaged premises and to collect the rents, issues and profits therefrom and to apply the same in accordance with the order of the court. Said motion came on for hearing on August 10, 1933, and the court entered therein an order to the same effect as that entered upon the same day in the suit hereinabove mentioned involving the Adele Manor property. Thereafter the same proceedings were had with respect to the rents and incomes from said Charmaine Apartments as those taken with respect to the Adele Manor Apartments, and the rents, issues and profits from the two properties were handled, accounted for and disposed of in the same manner.

On February 2, 1935, Portland Trust and Savings Bank filed in this cause its petition, setting out the facts hereinbefore stated with respect to said mortgages upon the Adele Manor and Charmaine Apartments, the institution of said foreclosure suits, the order of the said Circuit Court with respect to the collection, handling and accounting for the rents, issues and profits from said apartment houses, and praying for an order authorizing and directing John W. Kaste and C. W. Twining, as trustee, to pay to

the Clerk of the Circuit Court for Multnomah County all of the net rentals derived from the mortgaged premises, less the 20% thereof to be deducted for the use of the furniture and fixtures. No final action has been taken by the court on that petition.

[57]

III. Mortgage Held by Metropolitan Life Insurance Company.

Marvilla Court Apartment.

On September 17, 1929, Irving A. Duncan and Ethel J. Duncan, husband and wife, being then the owners of Lots 11 and 12, in Block numbered 107, Irvington, in the City of Portland, Oregon, executed to Portland Trust and Savings Bank a mortgage on said property to secure the payment of a promissory note in the principal sum of \$25,000.00 with interest at 6% per annum, payable \$750.00 on September 1, 1930, and a like amount on the first day of each March and September thereafter until March 1, 1940, when the balance of the principal sum should become due. This mortgage was recorded September 17, 1929, in Book 38, at page 47, et seq., Record of Mortgages for Multnomah County Oregon. Said mortgage contained the following covenant:

“The rents, issues and profits of the mortgaged property, to and until maturity of the indebtedness secured hereby, either by lapse of time or by reason of default of the Mortgagors, shall belong to the Mortgagors, but upon maturity of said indebtedness for any cause, the

Mortgagee shall have the right forthwith to enter into and upon the mortgaged premises and take possession thereof, and to collect the rents, issues and profits thereof, and apply the same, less reasonable costs of collection, upon the indebtedness hereby secured, and the Mortgagee shall have the right to the appointment of a receiver to collect the rents, issues and profits of the mortgaged premises immediately upon default of the Mortgagors and without notice."

On July 18, 1930, Irving A. Duncan and Ethel J. Duncan conveyed said mortgaged property to Guaranty Trust Company subject to said mortgage, but Guaranty Trust Company did not assume the personal indebtedness of the mortgagors. After the execution of said mortgage and prior to the 1st day of January, 1934, Portland Trust and Savings Bank transferred and assigned said mortgage and the note secured thereby to Metropolitan Life Insurance Company. [58]

As of November, 1935, there was due upon said note and mortgage, principal in the sum of \$22,-355.97, interest in the sum of \$3,434.80, and taxes advanced by the mortgagee in the amount of \$1,936.44. The 1935 taxes in the amount of \$426.08 were not paid. For many years there has been and is now located upon said mortgaged property an apartment house known as the Marvilla Court Apartment, and the apartments therein have been rented. On October 29, 1934, Metropolitan Life In-

insurance Company filed in this proceeding a petition setting out the facts above stated with respect to said mortgage and the indebtedness secured by it and praying that it be permitted to file a suit to foreclose said mortgage and that the trustee herein be required to segregate and keep separate for the benefit of Metropolitan Life Insurance Company the rents, issues and profits derived from the mortgaged premises. Permission to foreclose said mortgage was granted and in July, 1935, a suit for the foreclosure of said mortgage was instituted in this court.

IV. Mortgage Held by Joseph A. West. Multnomah Court Apartment.

On February 16, 1927, Julia Douglas, a widow, being then the owner of Lots 8 and 9, in Block lettered A, Holiday Park Addition to the City of Portland, together with an adjacent strip of land, executed to the Mortgage-Bond Company of New York, a New York corporation, a mortgage covering said property to secure the payment of a note in the sum of \$24,000.00, with interest thereon at 6½% per annum, payable in installments of \$625.00 each on the first days of March and September during the years 1929 to 1936, inclusive, and the balance of \$14,000.00 on the first day of March, 1937. The mortgage was recorded on February 19, 1927, in Book 1212 at page 323, et seq. Mortgage Records for Multnomah County, Oregon. The [59] mortgage contained the following covenant:

“As an additional security and pledge for the payment of said indebtedness, and subject to the terms and provisions of this mortgage, said mortgagor does hereby bargain, sell, and assign to said mortgagee all the rents, issues, and profits of said premises, and in event of a bill or complaint being filed to foreclose this mortgage, the court shall, on motion or application of said mortgagee, either at the time of filing such bill or complaint or thereafter, and without regard to the condition of said property at such time, appoint a receiver to collect the rents and profits of said premises during the pendency of such foreclosure and apply such rents, issues, and profits to the payment pro tanto of the amounts due under this mortgage, first deducting all proper charges and expenses of such receivership, and said mortgagor agrees to forthwith surrender possession to any receiver so appointed.”

After the execution of said mortgage and prior to the first day of January, 1934, said mortgaged property was transferred by mesne conveyances to National Investment Corporation. On June 15, 1934, said mortgage and the note secured thereby were assigned and transferred to Joseph A. West who owns the same.

As of November, 1935, there was due and unpaid on said note and mortgage the sum of \$20,250.00 with several years' interest.

There is located upon said property an apartment house, known as Multnomah Court Apartments, and the apartments therein have been rented.

By an order of this court entered August 1, 1935, permission was granted to Joseph A. West to institute a suit for the foreclosure of said mortgage and on August 19, 1935, a complaint to foreclose the mortgage was filed in the Circuit Court of the State of Oregon for Multnomah County (cause No. 119-303, Joseph A. West, plaintiff, v. Guaranty Trust Company, et al, defendants). There has been no attempt to sequester the rents and income from the mortgaged property except such as may appear from the facts stated in this report. [60]

Facts Pertaining to All Mortgages.

The order of the court entered September 10 1934, appointing a trustee in this proceeding, contained the following:

“Ordered that said trustee shall forthwith take possession of all property, assets, and business of the Guaranty Trust Company and National Investment Company and of each of them, wheresoever situated, and to make and file herein an inventory or schedule thereof; and it is further

Ordered that said trustee shall have power and authority to manage, operate and control the properties and assets coming into his possession, and to incur the usual and necessary expense usually incident to the operation

thereof, provided, however, that all expenditures be made upon order of the court; and it is further

Ordered that said trustee shall keep separate accounts of all moneys coming into his possession from each of the several properties of the debtor or its said affiliate, and that the trustee's accounts shall be kept so that all income and revenues received and expense incurred in the operation of each of such properties can at all times be ascertained and segregated."

Pursuant to that order, the trustee took possession of the mortgaged properties herein above described on September 14, 1934, and ever since has been collecting the rents and income from them. In his accounts, the trustee has kept the income from the several mortgaged properties segregated so as to show the gross amount of income from each. Likewise, he has kept segregated the allocable items of expense incurred in maintaining and operating each of those properties. From the gross receipts from all properties, the trustee has paid out certain items of expense, like general supervision, incurred in managing and operating the properties, but which could not be allocated definitely to any particular property, except upon some arbitrary basis which has not been prescribed.

From the handling of these mortgaged properties there has accumulated in the hands of the trustee a net balance of income above expenses of operation of between \$10,000.00 and \$20,000.00, which all [61]

parties other than the mortgagees claim is subject to the payment of the several claims now presented. Except for this fund, there are no substantial assets in the hands of the trustee available for the payment of those claims.

I find that if the mortgagees are entitled to hold the rents and income from the respective mortgaged properties as a part of their security, there should be deducted from such rents and income and retained as general assets of the Debtors' estate, such amounts as will reasonably compensate the estate for collecting such rentals and supervising and managing the mortgaged properties. I conclude from the testimony that 5% of the gross income from each of the apartment houses is a reasonable sum to be retained to cover the expense to the estate of handling that property.

In some of the mortgaged apartment houses, the apartments are furnished in whole or in part by furniture and equipment belonging to the debtor and not covered by the lien of the mortgages. Rents and income obtained from the use of such furniture and equipment cannot be treated as security for the respective mortgage debts, but constitute general assets of the Debtors' estate. I find that as to each of the furnished two-room apartments, \$2.50 per month, and as to each of the furnished apartments comprising three rooms, \$3.50 per month, and as to each furnished apartment comprising four or more rooms, \$4.00 per month, should be considered as representing income from furniture and equipment in

those apartments; and with respect to all those apartments furnished with furniture and equipment not covered by the mortgagee's lien on the building, such income from furniture and equipment should be considered general assets of the Debtors' estate.

General Conclusions of Law on Claims of Mortgagees.

Section 5-112 Oregon Code 1930 provides:

“A mortgage of real property shall not be deemed [62] a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law; provided, that nothing in this act contained shall be construed as any limitation upon the right of the owner of real property to mortgage or pledge the rents and profits thereof, nor as prohibiting the mortgagee or pledgee of such rents and profits, or any trustee under a mortgage or trust deed from entering into possession of any real property, other than farm lands or the homestead of the mortgagor or his successor in interest, for the purpose of operating the same and collecting the rents and profits thereof for application in accordance with the provisions of the mortgage or trust deed or other instrument creating the lien, nor as any limitation upon the power of a court of equity to appoint a receiver to take charge of such real property and collect such rents and profits thereof.”

That part of the section which includes and follows the word "provided" was added by an amendment which took effect May 28, 1927. (General Laws of Oregon 1927, Chapter 310, page 392) The remainder of the section has stood in the same form since 1862. Some of the mortgages in question were executed prior to the effective date of the 1927 amendment, and others were executed thereafter.

Mortgages Executed Prior to 1927 Amendment to Section 5-112 Oregon Code 1930.

Parties other than the mortgagees, while claiming that all income from the mortgaged properties is subject to the payment of their claims, urge that this is particularly true as to the income from properties mortgaged prior to the effective date of the 1927 amendment, for the reason that Section 5-112 Oregon Code in its then existing form rendered void, as against public policy, any agreement pledging the rents, issues or profits from the mortgaged properties as security for the mortgage debt. They rely on such cases as *Teal v. Walker*, 111 U. S. 242; *Thompson v. Shirley*, (Oregon District Court), 69 Fed. 484; and *Couper v. Shirley* (C. C. A. 9th), 75 Fed. 168; construing the Oregon statute, and *Hazeltine v. Granger*, 44 Mich. 503 (7 N. W. 74), *Wagar v. Stone*, 36 Mich. 364; *Detroit Trust Co. v. Lipsitz*, 264 Mich. 404 (249 N. W. 892); *Western Loan & Bldg. Co. v. Mifflin*, [63] 162 Wash. 33 (297 Pac. 743); and *State ex rel Gwinn v. Superior Court*, 170 Wash. 463 (16 Pac.(2d) 831); construing simi-

lar statutes in Michigan and Washington. These cases hold, in substance, that under such statutes a mortgage is merely security for a debt and not a conveyance; that the mortgagee is not entitled to possession until he gets it by a decree of foreclosure; that not being entitled to possession, the mortgagee's claim to the rents prior to foreclosure "is without support"; and that a stipulation pledging the rents to secure the mortgage debt is contrary to the public policy of the state as declared in the statute.

On the other hand, these same cases hold that such a statute does not take away from courts of equity the power to appoint a receiver to take possession of the mortgaged property and collect the rents and profits therefrom, upon a showing that the mortgagor is insolvent and that the security is inadequate or that waste is being permitted. The same courts hold that non-payment of taxes may constitute waste within that rule. (*Newman v. Northwick*, 95 Wash. 489, 164 Pac. 61; *Euphrat v. Morrison*, 39 Wash. 312, 81 Pac. 696; *Nusbaum v. Shapero*, 249 Mich. 252, 228 N. W. 785).

Except for the respectability of the authority holding that a statute providing merely that

"a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law,"

renders void a voluntary agreement to place the mortgagee in possession or to secure the debt by an

assignment of the rents, it would be difficult for me to reach that conclusion. As said in *Roberts v. Sutherlin*, 4 Ore. 219, 224:

“The notion that a mortgagee’s possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor or creditor, between him and his mortgagor, rests upon no foundation,”

and further (224): [64]

“The result of this construction of the law of mortgages is simply declaratory of the true doctrine that the people should not be unnecessarily trammled or restrained in their right to deal with their property according to their own judgment of what may be for their best interests. If a mortgagor chooses to retain the possession of his mortgaged premises until a foreclosure and sale, he may do so; if he thinks that his interests will be promoted by investing his mortgagee with possession before that time, he is bound by his act according to the terms and legal effect of his agreement.”

Accordingly it is well settled in Oregon that if the mortgagee obtains possession of the mortgaged premises with the consent of the mortgagor or otherwise acquires such possession peaceably, he may retain possession until the mortgage debt is paid. (*Roberts v. Sutherlin*, 4 Ore. 219, 224; *Cooke v. Cooper*, 18 Ore. 142, 147-149; *Lambert v. Howard*, 49 Ore. 342, 345). In so holding the Oregon court,

construing this same statute in the Cooke case said (18 Ore. 148-149):

“It results, therefore, that while a mortgagee is not permitted to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt. This view of the law in no manner interferes with the just rights of the mortgagor, and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law, which have sometimes been permitted to prevail, and the mortgagee turned out of possession stripped both of the property and his mortgage debt as well.”

There is, of course, an obvious distinction between an agreement as to possession or rentals made at the time when the mortgage debt is created, and one made thereafter; but the Oregon Court did not rest the cited decisions on such a distinction. The differentiation which the Oregon Court did make was that between implications that would extend the mortgage contract beyond its terms, which the statute condemns, and voluntary stipulation as to possession, which the statute does not mention. And

these cases do made it clear that [65] a mortgage is still merely a lien, even though the mortgagee is in possession, and that such possession, at least after condition broken, is not prohibited by the statute.

It is urged that *State ex rel Nayberger v. McDonald*, 128 Ore. 684 is to the contrary. I do not think so. In that case, a first mortgage on property covered the rents and profits from that property. A second mortgage covered the property only and did not include the rents and profits. The claim to the rents was made by the second mortgagee who claimed, not through his second mortgage, but through the first mortgagee by subrogation. The court denied the right of subrogation because the second mortgagee had not paid the first mortgage debt; and it denied the right to the rents under the second mortgage because that mortgage did not grant that right, and none was created by statute when the parties had not so agreed.

Of course the validity and scope of the mortgages in question are to be determined by the law of Oregon. *Continental Bank v. Nineteenth & S. W. Corp.* (C. C. A. 3rd) 79 Fed.(2d) 284, 285. The mortgagees claim that the Oregon legislature has construed the former statute in their favor when it passed the 1927 amendment. On the other hand, those opposing the mortgagees claim that the legislature, by adopting that amendment, gave an opposite legislative construction of the prior statute. Authorities bearing generally on the subject are

cited in support of each of the opposing contentions. None of the cases cited are directly in point here, and we must determine the legislative purpose by analyzing the language used.

All that was added by the 1927 amendment was the proviso. Generally a proviso is not used to extend the purview of an act, but rather to explain or qualify what otherwise has been enacted. (*Minis v. United States*, 15 Pet. 423; *Olson v. Heisen*, 90 Ore. 176, 178; *Meyers v. Pacific States Lumber Co.*, 122 Ore. 315, 320)

The proviso begins with the significant language that "nothing herein contained shall be construed as any limitation upon [66] the right of the owner of real property to mortgage or pledge the rents or profits thereof * * *". It deals purely with the construction of the prior statute and does not purport to create a right which did not theretofore exist. "An expository or declaratory act is one that does not purport to change the former law but only to determine the proper construction to be placed upon the common law or a former statute" (59 C. J. 1181). I think that the 1927 amendment was an act of that character, and that the interpretation declared in 1927 was in accord with that intended in 1862 when the original statute was enacted. [67]

However that may be, I think that the 1927 amendment is applicable here. Such application does not impair, but rather carries out, the obligations of the agreements voluntarily made by com-

petent parties. "A statute may not be declared unconstitutional on the ground that it gives binding force to a voluntary agreement void or unenforceable when made", (12 C. J. 1060; Benton County Savings Bank v. Lowry, 160 Wis. 659, 152 N. W. 463); and that is true even though the contract when made was void on account of being against public policy. (Gross v. U. S. Mortgage Co., 108 U. S. 477, 488; Iowa Savings & Loan Association v. Heidt, 107 Iowa 297, 77 N. W. 1050).

It is my conclusion that with respect to the application of rents and income from mortgage properties, there is no difference, for the purposes of this case, between mortgages executed prior to the 1927 amendment and

Mortgages executed subsequent to the 1927
amendment to Section 5-112 Oregon Code,
1930.

Those opposing the mortgagees claim that under the 1927 amendment the right of the mortgagors to the appointment of a receiver for the sequestration of the rents and profits from mortgaged properties can be exercised only as an incident to a direct proceeding to foreclose the mortgages; that the appointment of a receiver can be made only upon a showing of the insolvency of the mortgagor and the inadequacy of the security; that prior to the commencement of this proceeding, no receiver for any of the mortgaged properties had been appointed nor had the rents and profits from any

of the properties been sequestered in any manner; that none of the mortgagees have submitted themselves to the jurisdiction of this court for any purpose; and that "under these circumstances the bankruptcy court did not and could not by any proper proceeding sequester the rents from these properties for the benefit of the mortgagees". [68]

Then explaining the broad factual premise thus assumed with respect to the two mortgage foreclosure proceedings instituted by Portland Trust and Savings Bank on July 2, 1933, for the foreclosure of its mortgages on the Adele Manor and Charmaine Apartment properties, respectively, they assert that while the appointment of receivers in those cases was applied for, no receiver was appointed; that the deposits in court under the orders then made for the deposit in court of the net income from the properties, ceased upon the appointment of the trustee in this proceeding; that moneys then in the hands of Mr. Kaste and later turned over to the trustee "were, in law, the moneys of the bankrupt, and hence little thereto vested in the trustee in bankruptcy upon his appointment"; and that rentals thereafter collected by the trustee from those properties came into his possession independently of any action taken in the foreclosure proceedings.

Taking up the two last mentioned mortgages first, it seems to me that the argument made confuses form with substance. A receiver is an officer of the court appointed as a convenient means of

carrying out the directions of the court in handling property in custodia legis. It is clear that the state court, though refraining from appointing a receiver for these two mortgaged properties, did intend to impound the net income from the mortgaged properties and thereby accomplish the same purpose as the appointment of a receiver. The orders were obeyed and the net income was paid into court as directed. That course would have continued except for the appointment of a trustee in this proceeding. It is not for this court to say that the state court should have followed one procedure or another for impounding these rentals; the important fact is that the state court, in a manner deemed by it and the parties to be appropriate, did in fact take charge of these rentals for the protection of the mortgagee, and continued to exercise that control until action of this court intervened. Those rights cannot [69] be prejudiced by the action of this court in appointing a trustee to take possession of the property. (*Continental Bank v. Nineteenth & S. W. Corp.* (C. C. A. 3rd) 79 Fed.(2d) 284, 285). That the state court acted directly instead of through its receiver in the handling of those funds does take away the rights acquired by the mortgagees prior to the commencement of this proceeding. It is my conclusion, therefore, that the rentals from those two properties were appropriately sequestered and the rights of the mortgagee therein must be determined on that basis.

As to the rentals from the other mortgaged properties a different question is presented. If this were

the usual bankruptcy proceeding not involving Section 77-B of the Bankruptcy Act, we would have the aid of precedent, although even then the adjudications are conflicting. See note 75 A. L. R. 526 under heading "Rights in respect of rentals and profits as between mortgagee and trustee in bankruptcy of mortgagor", wherein the author summarizes the cases as follows:

"A conflict exists on the question here considered. By the weight of authority it is held that the mortgagor is entitled to rents and profits accruing up to the time the mortgagee enters, or brings a bill to foreclose or enter, and that this right inheres in the mortgagor's trustee in bankruptcy and that the latter, up to the time the mortgagee takes action, takes the rents and profits for the benefit of the bankrupt's creditors."

The majority rule as thus announced was followed by the Circuit Court of Appeals of the Ninth Circuit in *Re Hotel St. James Company*, 65 Fed. (2d) 82. In that case the mortgage authorized the mortgagee (trustee for bondholders) to take possession of the property and operate it for the benefit of the bondholders or to obtain the appointment of a receiver to take charge of the property and collect the rents and income from it. But the mortgagee, at the time the mortgagor was adjudged a bankrupt, had not taken possession of the property, nor obtained the appointment of a receiver. After the adjudication in bankruptcy, [70] no application

was made to the bankruptcy court to direct the receiver to sequester the rents. After the property had been sold, the mortgagee made claim to the rentals collected by the trustee. In denying the claim, the court said (84-85):

“The trust indenture provided:

‘If one or more of the events of default shall happen, the Trustee * * * shall enter * * * and take * * * possession of the trust estate, * * * and may * * * operate * * * the estate, and conduct the business thereof to the best advantage of the holders of the bonds secured hereby. * * *

‘The Trustee shall be entitled to the appointment of a receiver of the trust estate and of the earnings, rents, dividends, income, interest and profits thereof. * * *’

No attempt was made by bondholders, or trustee under the trust deed, to take possession before bankruptcy or to have a receiver appointed specifically for their benefit. No petition was addressed to the bankruptcy court to direct the general receiver, or the trustee, to sequester the rents and profits, as in *Mortgage Loan Co. v. Livingston*, supra; no claim to the rents was made until after the sale.

In such circumstances the second Circuit in *re Brose*, 254 F. 664 (1918), has held that the mortgagee is not entitled to the money. After quoting at page 666 of 254 F. from *Freedman’s*

Savings & Trust Co. v. Shepherd, 127 U. S. 494, 8 S. Ct. 1250, 32 L. Ed. 163 (1888):

‘The general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver, * * * or until, in proper form, he demands and is refused possession,’ the court continued: ‘This general rule the federal courts will follow, except in cases where it appears that the law of the state where the premises are situated applies a different rule.’”

The court found that such was the rule in New York. So it is in California. 17 Cal. Jur. Sec. 288, page 1013; *Freeman v. Campbell*, 109 Cal. 360, 42 P. 35 (1895); *Simpson v. Ferguson*, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201 (1896). And a trust deed in California gives no greater right to possession, and thus rents, than does a mortgage. 25 Cal. Jur. Sec. 29, page 41; 17 Cal. Jur. Sec. 25, page 721. Cases in other courts are collected in notes 4 A. L. R. 1405, 1410; 55 A. L. R. 1020, 1022.

Without citing *In re Clark Realty Co.*, 234 F. 576, in which, in 1916, the Seventh Circuit Court of Appeals denied the mortgagee’s right to such rents, that court, in 1931, *In re Wakey*, 50 F.(2d) 869, 871. 75 A. L. R. [71] 1521, reached the opposite conclusion. We cannot concur therein or in the statement that while the

facts in the Livingston case, supra, 'are not in all respects similar * * * the principle involved is the same.' In the Livingston case, foreclosure was commenced before bankruptcy, and, as the court said, would have given the mortgagee possession, but for the bankruptcy, two days after the petition in bankruptcy was filed. Moreover, immediately upon the appointment of the receiver in bankruptcy, the mortgagee requested sequestration of the rents, to which the receiver assented, and repeatedly thereafter asked leave to continue the enjoined foreclosure."

This case, like most of the others applying the same rule, points out the failure of the mortgagee to make timely and appropriate application to the bankruptcy court for a sequestration of the rents. Moreover, in that case, as in many of the others reaching a like conclusion, there was no express assignment of the rents and profits as security for the mortgage debt, there being an important distinction between a mere right of the mortgagee to take possession, by a receiver or otherwise, upon default, and an express assignment of the rents and profits as a part of the security pledged originally.

But as I view our present question, it is not settled by the cases cited on either side. Section 77-B, not involved in any of those cases, confers upon the court powers with respect to the possession and control of the debtors' property that are much broader than those formerly vested in the bankruptcy Court. The preservation of the debtors'

properties and relationships for the purpose of working out a reorganization and the continuation of the debtor in business, required wider powers in this respect than is necessary in a mere liquidation proceeding. Reorganization contemplates conference and negotiation with creditors and stockholders, the submission and study of reorganization plans, the opportunity to propose and consider modified or substitute plans, the rearrangement of the debtors' corporate and debt structures, and the negotiation of many contracts and other instruments of various kinds essential to a reorganization, and all this ordinarily requires much more time than a straight liquidation, conducted for the greater part *ex parte*. [72] In the meantime it is necessary that the debtors' properties be preserved intact as a going concern. To accomplish that, it was necessary, so far as Congress could authorize it to be done, to bring all properties of the debtor under the control of the court and hold creditors at bay until the success or failure of the reorganization program may be determined.

In these circumstances, if the filing of a petition under Section 77-B is to tie the hands of a mortgagee whose mortgage is in default while the trustee takes possession of that property and collects the rent for the benefit of others for a long period of time, the result is to take from the mortgagee some of the substance of his security. Since he can obtain protection only through the court having jurisdiction of the reorganization proceeding, he

ought not to be held to have waived his rights by failing to apply to some other forum that is powerless to help him. The only course open to the mortgagees here for the protection of their rights in the mortgaged property was that which they actually took, namely, to apply to this court to have segregated and held for them the rents and profits from the properties mortgaged to them, until such time as the proposed reorganization should be accomplished or liquidation should be directed.

The thought I have in mind is illustrated by the decision of the Circuit Court of Appeals of the Second Circuit in *Prudential Ins. Co., v. Liberdar Holding Company*, 74 Fed.(2d) 50, wherein a mortgagee was claiming rentals collected by a receiver from mortgaged property. The court said (p. 53):

“In dealing with an Oregon statute (Gen. Laws Or. 1843-1872, c. 4, tit. 1, Sec. 323) providing that ‘a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale according to law,’ the Supreme Court held that a covenant in a mortgage requiring possession to be given to the mortgagee in the event of default was unenforceable. *Teal v. Walker*, 111 U. S. 242, 4 S. Ct. 420, 28 L. Ed. 415. We think that the effect of the New York Act of 1828 (2 N. Y. Rev. St. (1st Ed.) 1829, p. 312, pt. 3, c. 5, tit. 1, Sec. 57 [73] (now Civil Practice Act, Sec. 991) forbidding a mortgagee to bring ejectment for the recovery of possession of

mortgaged premises in the event of default (section 991, Civil Practice Act) cannot be avoided by a contract between the parties. *One Hundred and Forty-Eighth Street Realty Co., Inc. v. Conrad*, 125 Misc. 142, 210 N. Y. S. 400. It is much more in accord with its spirit that the court should appoint a receiver in foreclosure or if, as in the present case, receivers have already been appointed in a suit for conservation of assets, that the court should retain possession of the property and have the rents collected for the benefit of all concerned. In this way the general creditors will not be in a position to complain of mismanagement by the mortgagee, *while the latter will have its rights protected as fully as though the properties were in its own possession and under its management.**

We see no reason for enforcing a covenant which gives a mortgagee possession in the event of default. The receivers are vitally interested in the amount that may be derived from the premises in suit for, should the foreclosure sale yield enough to pay the mortgage, the rents would in effect wholly inure to their benefit. Their collection of the rentals pursuant to the decree *will serve the interest of all parties.*”

In view of the unusually broad powers conferred by Section 77-B upon the court and the trustee with respect to possession and control of the debtors' property, I think that in the case at bar, as in the

*[Printer's Note: Emphasis by the Court.]

one last cited, the appointment of the trustee and his possession were intended to "serve the interests of all parties", including the mortgagees, and that they did not lose any of their rights by a course of action which they could not prevent.

It is my conclusion, therefore, that the order of this court dated September 10, 1934, directing that the rentals and income from the various properties should be kept segregated, the obedience to that order by the trustee, and the petitions of the respective mortgagees to have those rentals kept separate for their benefit, operated as a sufficient sequestration of those rentals to preserve the rights of the mortgagees in them. Had there been appointed a separate receiver for each apartment house to hold possession or collect the rents for a particular [74] mortgagee, the sufficiency of the sequestration would be readily apparent, and I think the same result could be and was obtained by the appointment of a single trustee to handle all of the properties with a segregation of the income and expenses of each of them. I think the course taken was an orderly one which, as intended, protected the rights of all parties during the interval when the debtors were trying to work out a reorganization.

Substantially the same ultimate result will be reached by another line of reasoning. While the trustee was in possession of the mortgaged properties and operating the several apartment houses, he was required to pay, as a part of the operating

expenses, the taxes on the properties which accrued during that period. As said in *Re Humeston* (C. C. A. 2d) 83 Fed.(2d) 187, 189:

“Such taxes as fell due during the period of the trustee’s occupation were part of the expenses of that occupation and should be borne by the estate. *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 52 S. Ct. 512, 76 L. Ed. 1136; *MacGregor v. Johnson-Cowdin-Emmerich, Inc.*, 39 F.(2d) 574, 576 (C. C. A. 2); *Central Vermont R. Co. v. Marsch*, 59 F.(2d) 59 (C. C. A. 1); *Prudential Ins. Co. v. Liberdar Holding Corporation*, supra, 74 F.(2d) 50. This is not contrary to our decision in *Re Kings County Real Estate Corporation* (C. C. A.) 67 F.(2d) 895. There, a second mortgagee had got the rents sequestered in his favor, and we held that he might take them without deduction, leaving unpaid even those taxes which accrued during occupation. In this we followed the New York law, *Ranney v. Peyser*, 83 N. Y. 1. The distinction is that a mortgagee who enters or gets a sequestration order does not by that alone embark upon a venture on the land; he is merely collecting his debt. He may indeed, as we suggested, put himself in the same class as the mortgagor, if for instance he delays foreclosure so long that it is reasonable to infer that he is using the land as an independent enterprise; but the sequestration is not enough without more. When on the other hand the

mortgagor's trustee continues the occupation, he necessarily means to exploit it for profit, and the gross returns must pay the running expenses. Thus taxes which became payable between November 1, 1933, and May 21, 1935, must be paid, and not only the entire face of these, but all interest and penalties accumulated upon them. It was the trustee's duty to pay them when they fell due, and the estate must suffer from his failure."

While I do not have before me exact figures whereby the amount of the net rentals received by the trustee from a [75] particular apartment house can be compared with the taxes accruing against that property during the period of the trustee's possession, I surmise that as to most of these properties such taxes will approximate, if they do not exceed, the amount of net rentals collected, after making the deductions therefrom which I find should be made before the rentals are applied for the benefit of the respective mortgagees. If that is true, the other questions discussed above are unimportant and do not affect the ultimate result. I do not think the situation is affected by the fact that the mortgagees, to protect their respective securities, paid these taxes in the first instance instead of asking for an order of the court directing the trustee to pay them. [76]

Specific Conclusions of Law on Claims of
Mortgagees.

Taking up each of the claims of the mortgagees separately, I conclude that:

1. The net rentals and income from the Nordell Apartment property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Investors Syndicate to be applied toward the payment of its mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

2. The net rentals and income from the Resthaven Apartment property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Investors Syndicate to be applied toward the payment of its mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

3. The net rentals and income from the Chapman Court Apartment property in the hands of the

trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Investors Syndicate to be applied toward the payment of its mortgage above [77] described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

4. The net rentals and income from the Duplex Apartment (First) property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Investors Syndicate to be applied toward the payment of its mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

5. The net rentals and income from the Duplex Apartment (Second) property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income re-

ceived since September 14, 1934, should be held by the trustee for the benefit of Investors Syndicate to be applied toward the payment of its mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

6. The net rentals and income from the Adela Manor property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Portland Trust and Savings Bank to be applied toward the payment of its mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10. [78]

7. The net rentals and income from the Charmaine Apartment property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Portland Trust and Savings Bank to be applied toward the payment of its mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

8. The net rentals and income from the Marvilla Court Apartment property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Metropolitan Life Insurance Company to be applied toward the payment of its mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

9. The net rentals and income from the Mulnomah Court Apartment property in the hands of the trustee, after making deductions therefrom of (a) amounts representing income from furniture and equipment not covered by the mortgage lien computed on the basis indicated in this report, and (b) five per cent of the gross rentals and income received since September 14, 1934, should be held by the trustee for the benefit of Joseph A. West to be applied toward the payment of his mortgage above described on that property, subject to the condition hereafter stated in conclusion of law No. 10.

10. If upon foreclosure sale of any of the mortgaged properties above mentioned, the foreclosure decree shall be [79] satisfied to such an extent that the deficiency, if any, remaining shall be less than the net rentals and income in the hands of the

trustee and applicable to payment of the mortgage debt, then any overplus of such rentals and income, after paying such deficiency, should be treated as general assets of the debtor's estate and applied toward payment of appropriate expenses of administration and the claims of creditors. [80]

On December 5, 1936, the petitioning and intervening creditors and Ralph A. Coan and S. J. Bischoff, their attorneys, individually duly served and filed herein their exceptions to the report of Roy F. Shields, Special Master, dated November 14, 1936, as follows:

(Title of Court and Cause.) No. B-18784

EXCEPTIONS

of Petitioning and Intervening Creditors and of Ralph A. Coan and S. J. Bischoff to the Findings and Conclusions of Roy F. Shields, Special Master, contained in his report dated November 14, 1936.

Come now the petitioning and intervening creditors in the above entitled proceeding and Ralph A. Coan and S. J. Bischoff, and do hereby make and file herein the following exceptions to the report of Roy F. Shields, Special Master, dated November 14, 1936, as follows:

I.

Except to the "conclusions of law on claims of mortgagees" numbered respectively 1 to 10 inclusive, in so far as the Master holds that the rents

now in the hands of the Trustee herein, which were collected from the properties covered by the mortgages described in said conclusions, should be held by the Trustee for the benefit of the mortgagees, for the reason that the Special Master erred;

(a) In holding that the 1927 amendment to Section 5-112, Oregon Code, authorized the appointment of a receiver of rents and profits of mortgaged premises, and the application of the said rents and profits to the mortgage debt, upon mortgages executed prior to the adoption of the 1927 amendment.

(b) In holding that there was any lawful sequestration of said rents and profits derived from any of the mortgaged properties by lawful receivership or otherwise.

(c) In holding that rents and profits may be sequestered in the absence of any proceeding for the foreclosure of the mortgage lien.

(d) In holding that the order of Judge McNary, dated Sept. 10, 1934, constituted a sequestration of rents and profits from the said mortgaged premises. [81]

(e) In holding that the moneys turned over by John W. Kaste to the Trustee herein were moneys which constituted sequestered rents and profits.

(f) In holding that sequestration of rents could be made for the benefit of the mortgagees who had not submitted themselves to the jurisdiction of the Court but on the contrary appeared herein specially and objected to the jurisdiction of the Court over said mortgagees and the property covered by the several mortgages.

(g) In holding that the Trustee's possession of the mortgaged premises was in law the possession of the mortgagees.

II.

Except to the conclusion of the Special Master in said report in so far as it recommends the allowance of any fees to John W. Kaste and W. B. Shively for services alleged to have been rendered to the bankrupt-debtor in these bankruptcy proceedings, for the reason that there is no evidence in the record and no finding of fact by the Master that the said John W. Kaste and W. B. Shively rendered any services whatsoever of the character for which compensation may be allowed under the Bankruptcy Act, and on the further ground that the record establishes that the only services rendered by the said John W. Kaste and W. B. Shively were in connection with the opposition to an adjudication in bankruptcy and in connection with the abortive plan of reorganization, and none other.

III.

Come now the petitioning and intervening creditors and Ralph A. Coan and S. J. Bischoff and move the Court for an order confirming the said report of the Special Master in all respects other than as excepted to herein.

Dated this 5th day of December, 1936.

RALPH A. COAN

S. J. BISCHOFF

Petitioners, and Attorneys for Petitioning
and Intervening Creditors.

Under dated of June 8, 1938, the Judge of the District Court rendered his opinion as follows, to-wit: [82]

[Title of Court and Cause.]

MEMORANDUM ON APPLICATION OF RENTS
AND PROFITS FROM MORTGAGED PROP-
ERTY

James Alger Fee, District Judge:

The question raised is whether the respective mortgagees of the various parcels or the trustee in bankruptcy shall be entitled to the rents, issues and profits collected from the various parcels of real property under direction of this court. The weight of authority in the federal courts favors award of these moneys to the trustee in bankruptcy. *Re Hotel St. James Co.*, 65 F.(2d) 82 (C. C. A. 9 Cal.); *Dallas Trust & Savings Bank vs. Ledbetter*, 36 F.(2d) 221 (C. C. A. 5 Texas); *In re Brose*, 254 F. 664 (C. C. A. 2). See Note 75 A. L. R. 1526. But since this real property is situate in Oregon, the bankruptcy court must apply the law of that jurisdiction in determining the disposition of rents and profits from the land. *Continental Bank vs. Nineteenth & W. Sts. Corp.*, 79 F.(2d) 284, 285; cf. *Erie Railroad Company vs. Tompkins*, U. S. Sup. Ct. Apr. 25, 1938. The state law is paramount and must be applied even if it conflicts with a contrary doctrine adopted by bankruptcy courts.

The Oregon statute of 1862 provided:

“A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law.” L. 1862, Sec. 323, p. 85.

The act of 1862 did not make illegal the mortgage or pledge of rents or profits, nor did it proscribe the entry of the mortgagee or pledgee or a trustee under a trust deed from entering to collect the rents and profits for application in accordance with any document giving a lien. The law did not in terms prevent the courts from [83] appointing receivers to carry out the agreement of the parties as to a pledge of the rents and profits. The enactment specifically denounced, however, the granting of any remedy whereby the mortgagee or his assignee should recover the possession of the real property without foreclosure and sale. However, under this statute it was consistently held up to the time of the amendment thereof in 1927 that the public policy of the state prevented the enforcement of any agreement to mortgage or pledge the rents and profits of real property to the mortgagee and the entry of the latter on the mortgaged premises and the appointment of a receiver by a court for the purpose of enforcing such a pledge, *Teal vs. Walker*, 111 U. S. 242; *Thompson vs. Shirley*, 69 F. 484, D. C. Oregon; *Couper vs. Shirley*, 75 F. 168 (C. C. A. 9 Oregon).

The statute above quoted was amended in 1927 to read as follows:

“A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law, provided, that nothing in this act contained shall be construed as any limitation upon the right of the owner of real property to mortgage or pledge the rents and profits thereof, nor as prohibiting the mortgagee or pledgee of such rents and profits, or any trustee under a mortgage or trust deed from entering into possession of any real property, other than farm lands or the homestead of the mortgagor or his successor in interest, for the purpose of operating the same and collecting the rents and profits thereof for application in accordance with the provisions of the mortgage or trust deed or other instrument creating the lien, nor as any limitation upon the power of a court of equity to appoint a receiver to take charge of such real property and collect such rents and profits thereof.” Sec. 5-112, Ore. Code Ann., 1930 Ed.

This proviso is expository upon its face and extremely limited in scope.

The right to pledge or mortgage rents and profits which was not specifically denounced by the original law is now confirmed. The sole remedy distinctly

declared to be in accordance with public policy, however, by the amendment is a receivership established by a court. A receiver must be appointed in a suit. A complaint upon equitable principles to prevent waste on the mortgaged property or [84] for the foreclosure of the mortgage occur most readily as examples of the suit in which such an officer could be appointed. This provisional remedy to enforce a pledge or mortgage of the rents and profits is ancillary in nature to such a main proceeding. This court has, under this statute as amended, appointed a receiver as ancillary to a foreclosure proceeding and applied the rents upon the debt according to the agreement of the parties where there were no intervening claims. *New York Life Insurance Co. vs. Progressive Realty Co.*, No. E-9504, Judgment Roll 18902 (January 7, 1935). Such a remedy has likewise been granted by many trial courts of the state of Oregon, but always ancillary to a main proceeding in equity. The Supreme Court of Oregon has held such an appointment void in one case which may be distinguishable under other grounds. See *State ex rel. Nayberger vs. McDonald*, 128 Or. 684. The extreme caution with which even this remedy is applied is indicative of the strong feeling for the public policy enunciated in the original act.

The amendment also confirms the right of the mortgagee if he can come peaceably in possession to apply the rents and profits in accordance with an agreement with the mortgagor. See *American Trust Co. vs. England*, 84 F.(2d) 352 (C. C. A.

9 Cal.). But the proviso did not change the body of the statute which denies to a mortgagee any remedy for obtaining possession of the mortgaged premises. The mortgagor may still refuse possession, retain the rents and profits, and he will not be liable therefor in accordance with *Teal vs. Walker*, supra. The law is unchanged that the mortgagor still has the right of possession, although a pledge or mortgage of the rents and profits may be enforced strictly in accordance with the statute upon equitable premises if full protection be given to intervening rights. So construed, the proviso is valid since the agreement to assign the rents accruing after default was not illegal when made and since the proviso grants remedies narrowly circumscribed.

These stipulations, therefore, under the law of Oregon, [85] amount only to an equitable assignment of the rents and profits and as such may be applied between the original parties and their respective assignees. No right therein or lien thereon exists until the payments become due and are reduced to possession either by the mortgagee or the receiver of a court. Such an agreement in a real estate mortgage confers no additional lien upon the land.

If the facts in the case at bar be reviewed in the light of the Oregon law, the claims can be determined. None of the mortgagees ever had possession until after sale upon foreclosure of the parcel covered by his respective mortgage. No one of these

mortgages was foreclosed or liquidated in the bankruptcy tribunal. No court in which one of these mortgages was foreclosed appointed a receiver of any of these parcels. If a receiver had been duly appointed by a state court, pursuant to the statute, before the filing of the involuntary proceeding, and collected these rents, not even the trustee in bankruptcy could have prevailed against him. *Duparquet vs. Evans*, 297 U. S. 216. No application was made to the trustee in bankruptcy who was joined as a defendant in these foreclosure suits to turn over possession of the property. The adverse nature of his possession and interest is thus made clear. No application was made to have the trustee abandon the property (see *In re Clark Realty Co.*, 234 F. 576 (C. C. A. 7 Wis.)) or to have the same sold in bankruptcy free and clear of liens. The foreclosures proceeded to sale. The mortgages are thus wiped out. The equities of redemption have been sold by the trustee. All these creditors now have are judgments for deficiency. But none of the mortgagees ever became parties to the bankruptcy proceedings, nor have any filed claims therein for the original debt or upon the deficiency judgment.

No distinction can be drawn in the case of the mortgages held by Portland Trust and Savings Bank where foreclosure was commenced in the state court prior to the filing of the involuntary petition. The state court did not appoint a receiver in that case [86] although petitioned to do so. Instead it recognized the possession of the Guaranty Trust

Company and since it had jurisdiction of the cause and the parties gave a direction to the Guaranty Trust Company in personam to pay the rentals monthly as collected and less an allowance for expenses into court for application upon the agreement. So far as that direction was obeyed it constituted a valid seizure of the rents. But the court did not lay its hand on the res or have possession of the property through a receiver, or otherwise. The possession of the realty by the Guaranty Trust Company was expressly recognized. No lien was thereby established upon rents subsequently accruing or paid. The court could only have enforced the order by contempt proceedings and after the appointment of a trustee in this court who took possession had no power over rents accruing in the future or moneys in the hands of the bankrupt.

Clearly enough, then, the mortgagees did not have any right to the rents, issues or profits under the Oregon law because they did not come into actual possession of the real property nor did they follow the specialized remedy set out in the amendment of 1927 to have the rents, issues and profits set aside for them.

It is contended, however, that since the trustee appointed by this court was in actual possession of the mortgaged premises that he held for the mortgagees. Some federal courts have so decided. *Bindseil vs. Liberty Trust Co.*, 248 F. 112 (C. C. A. 3 N. J.); *Mortgage Loan Co. vs. Livingston*, 45 F. (2d) 28 (C. C. A. 8 Missouri). Even these courts

limit the mortgagee's right to rents accruing after he has made demand for possession and been refused or after he has petitioned the bankruptcy court for sequestration. The law of many states gives the mortgagee a legal right to possession of the realty upon default. These opinions relating to the rents and profits must be read as interpretations of the applicable state law. None of them are more than illustrative when cited here since the Oregon law denies the mortgagee any remedy whereby he can get in [87] possession and gives him only a receivership ancillary to a foreclosure to apply the rents and profits to his theretofore inchoate lien.

In this case, a petition was filed under section 77-B of the bankruptcy act, and the court appointed a trustee for the debtor's property. No mortgagee, before this order of appointment, filed a petition, asking for possession or for sequestration of the rents and profits. The court did direct therein that the accounts of each parcel be kept separate, but did not express any intention of giving any mortgagee an interest therein. It was only sound book-keeping. Under these circumstances, the mortgagees having taken no steps to protect their supposed rights, could not prevail even under the decisions above cited. *In re Brose*, 254 F. 664 (C. C. A. 2 N. Y.). Furthermore, the purpose of section 77-B was to continue the debtor in possession of his property until he could be rehabilitated. 11 U. S. C. A. Sec. 207c,1. It is true the court could appoint a

trustee to hold the property instead of the debtor. This does not change the rationale of the provision. The whole statute contemplates the isolation of the property of the debtor and prevents a struggle of creditors for priority by enjoining all proceedings and the creation of liens and the attaching of other rights until it should be determined whether the debtor might not be rehabilitated. If the mortgage creditors were deprived of remedies during this period, it can only be said that the statute is paramount. Besides, the record indicates that these same creditors played a major part in forcing liquidation by refusal to accept compromise so that the result is not inequitable. Where a dismissal of the proceeding is ordered, it might be equitable to pay the mortgagee for the unwarranted delay, out of the fund in court. See *Florida National Bank of Jacksonville vs. United States*, 87 F.(2d) 896 (C. C. A. 5 Fla.). See also *In re De Tamble*, 88 F.(2d) 893, (C. C. A. 7 Ill.). [88]

After liquidation was ordered, some of the mortgagees renewed or filed petitions for sequestration of the rents and profits. From the time of the first petitions by each mortgagee for sequestration, under some of the federal cases decided upon the foundation of the real property law of another state, a mortgagee had a legal right to the rents and profits. *Mortgage Loan Co. vs. Livingston*, 45 F.(2d) 28 (C. C. A. 8 Missouri). The rationale of these decisions is stated in *Binsdeil vs. Liberty Trust Co.*, 248 F. 112 (C. C. A. 3 N. J.) as follows:

“When bankruptcy cuts off a creditor’s legal remedies, under the exigencies of the debtor’s insolvency, it does not destroy his legal rights in the debt or in its security. * * * equity should protect them in the same measure and preserve to them the same advantages, so far as practicable, that the law gave them before bankruptcy stepped in and interfered with them * * *.”

But in this jurisdiction, the mortgagee, as has been pointed out above, had no legal right and but a tenuous equitable claim, subject to be cut off by other interests. See *Dallas Trust & Savings Bank vs. Ledbetter*, 36 F.(2d) 221 (C. C. A. 5 Texas). In applying the Oregon law relating to real property and the rights and remedies of mortgagees, the bankruptcy court should not improve the position of these creditors and extend to them rights which without the intervention of bankruptcy they would not have possessed. The trustee in bankruptcy, as the representative of the bankrupt, had possession of the realty. 11 U. S. C. A. Sec. 110. The mortgages were not foreclosed in bankruptcy. The bankruptcy court should not be required to sequester rents in the hands of its trustee for the benefit of adverse parties suing the trustee in alien tribunals. The equitable assignments were inchoate. cf. *In re West*, 128 F. 205, 206 (D. C. Oregon); *Sims vs. Jamieson*, 67 F.(2d) 409 (C. C. A. 9 Oregon). The courts in which they were foreclosed did not give the remedy prescribed by the statute and appoint a

receiver. See *In re Brose*, 254 F. 664 (C. C. A. 2 N. Y.). The mortgagees had no right otherwise to collect the rents and profits. Therefore, this court could not [89] sequester the rents and profits for their benefit.

Furthermore, the trustee in bankruptcy was vested as to these properties "with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon", 11 U. S. C. A. Sec. 75, probably from the date of the involuntary petition. See *Isaacs vs. Hobbs*, 282 U. S. 734; see also *Callaghan vs. R. F. C.*, 297 U. S. 464. As the rents accrued, these came into his possession thus as representative of the creditors and subject to the lien imposed by the statute in their favor. The mortgagees only held equitable assignments of these future rents which were not brought to fruition either by actual possession or by payment into the hands of a receiver. The legal and equitable position of the trustee in bankruptcy was, therefore, much stronger than that of the mortgagees.

The decision of the referee is reversed as to this feature. The court retains under advisement the other separate matters contained in the report. [90]

It is further stipulated that the foregoing is an agreed statement under Equity Rule 77 and that same, when filed in the office of the Clerk of the District Court, shall be treated as superseding for the purposes of the appeals herein all parts of the record other than the decree from which the appeal

is taken, and together with such decree shall be copied and certified to the Appellate Court as the record on appeal.

Dated this 27th day of October, 1938.

CHAS. W. REDDING

STEPHEN H. BOYLES

Attorneys for Investors Syndicate,
Appellant

HERBERT SWETT

CRUM & DUSENBERY

Attorneys for Portland Trust and
Savings Bank, Trustee, Appellant
CRUM & DUSENBERY

Attorneys for Metropolitan Life
Insurance Company, Appellant

McCAMANT, THOMPSON,

KING & WOOD

S. J. BISCHOFF and

RALPH A. COAN

Attorneys for Lloyd R. Smith,
Trustee in Bankruptcy, Ap-
pellees.

S. J. BISCHOFF

RALPH A. COAN

Attorneys for Petitioning and
Intervening Creditors and in
propria persona, Appellees.

[91]

The foregoing statement, as prepared and signed by the parties hereto, is hereby approved, and as

filed with the Clerk of the Court herein with the final order of the Court rendered and entered in said case on June 8, 1938, shall be certified to the Appellate Court as the record on appeal in said action.

The question as to whether any allowance should be made from the funds accruing during the bankruptcy proceeding from the mortgaged properties on account of taxes accruing during this period (see 40 to 43 agreed statement of facts) which is suggested as a ground of relief in this proceeding in the Report of the Special Master, was not argued or decided by the court and is specifically reserved for further proceeding.

JAMES ALGER FEE

Judge

[Endorsed]: Filed November 7, 1938. [92]

In the District Court of the United States
for the District of Oregon

No. B-18784

In the Matter of

GUARANTY TRUST COMPANY,

a corporation, and

NATIONAL INVESTMENT COMPANY,

a corporation, its affiliate,

Bankrupts.

ORDER SUSTAINING EXCEPTIONS TO
SPECIAL MASTER'S REPORT DATED
NOVEMBER 14, 1936, FILED NOVEMBER
16, 1936, AND DIRECTING TRUSTEE TO
FILE A REPORT AND ACCOUNTING

This cause coming on for hearing upon the exceptions filed by the petitioning and intervening creditors and Ralph A. Coan and S. J. Bischoff to the Findings and Conclusions of Roy F. Shields, Special Master, contained in his report dated November 14, 1936, which exceptions were directed to the "Conclusions of Law on Claims of Mortgagees", numbered 1 to 10, inclusive, insofar as the Special Master held that the rents now in the hands of the Trustee herein which were collected from the properties covered by the mortgages described in said Findings and Conclusions should be held by the Trustee for the benefit of the mortgagees and disbursed to the mortgagees in accordance with their respective petitions therefor, the intervening and

petitioning creditors and said Ralph A. Coan and S. J. Bischoff appearing herein in support of the said exceptions to said report by Ralph A. Coan and S. J. Bischoff, their attorneys, and the Portland Trust & Savings Bank, mortgagee, appearing herein by Verne Dusenbery and Herbert L. Swett, its attorneys, in opposition to said exceptions, The Investors Syndicate, mortgagee, appearing herein by Stephen H. Boyles, its attorney, in opposition to said exceptions, and Metropolitan Life Insurance Company, mortgagee, appearing herein by Crum & Dusenbery, its attorneys, in opposition to said exceptions, and New York Life Insurance Company, mortgagee, appearing herein by Huntington, Wilson & Huntington, its attorneys, in opposition to said exceptions, the cause was argued to the Court and now being fully advised in the premises,

It is ordered that the exceptions of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to the "Conclusions of Law on the Claims of Mortgagees", numbered 1 to 10 inclusive, insofar as the Master [93] holds that the rents now in the hands of the Trustee of the above entitled bankrupt estate which were collected from the properties covered by the mortgages described in the report and Conclusions of Special Master that said rents should be held by the Trustee for the benefit of the mortgagees and that said rents should be disbursed to the mortgagees in accordance with their respective petitions therefor, be and the

same hereby are in all respects sustained and the conclusions and recommendations of the said Special Master in said respects be and the same are hereby overruled; and

It is further ordered that all rents collected by the Trustee in the above entitled proceeding from the real properties which were subject to mortgages and which were collected prior to sale upon foreclosure of the property covered by said mortgages be held and disbursed by the Trustee as a part of the funds available for the payment of expenses of administration and general claims of the estate; and

It is further ordered that the opinion rendered herein under date of May 6, 1938, sustaining exceptions to said Special Master's report, which opinion was on the Court's own motion set aside under date of May 28, 1938, be and the same is hereby ordered to be filed and entered as the opinion of this Court, contemporaneously with this order; and

It is further ordered that the Trustee of the above entitled estate be and he hereby is ordered and directed to file with the Clerk of the Court within twenty days from the date hereof a report of the administration of the above entitled estate, and in making said report the Trustee shall incorporate therein the transactions of the two former trustees as to the receipts and disbursements in connection with the operation of each of the mortgaged apartment houses separately in the manner

provided for in the former orders entered herein, and a separate schedule of all other moneys coming into the hands of the present Trustee, or the former trustees, showing the balance of all moneys on hand; and

It is further ordered that disposition of all other exceptions and motions filed herein with respect to said Special Master's report is hereby reserved until the report of the Trustee is filed herein, at which time the Court will make further decisions with respect to the exceptions and motions remaining [94] undisposed of; and

It is further ordered that all motions filed by the mortgagees to confirm the said Special Master's report insofar as the Special Master recommended that the said rents are to be held for the benefit of the mortgagees be and the same hereby are denied; and

It is further ordered that this order is made without prejudice to the rights, if any there be, of the respective mortgagees to make claim herein for said rentals, or any part thereof, by reason of alleged failure of the Trustee herein to pay accruing taxes out of rents and profits collected, and likewise without prejudice to the rights of the respective mortgagees to make claim herein for reimbursement, out of the rents collected by the Trustee from the mortgaged properties, for taxes paid by the mortgagees upon the respective properties for which mortgages were held. The question of the right, if any there

be, of the said mortgagees to said rentals, or any part thereof, on account of the failure of the Trustee to pay taxes as aforesaid, and likewise the question of the right, if any there be, of the said mortgagees to such reimbursement was not referred to the Special Master and was not before him for consideration. The Court sustained the exceptions to the report of the Special Master on the grounds set out in the opinion filed contemporaneously herewith and did not consider or determine the question as to the right, if any there be, of the mortgagees to reimbursement for money paid by them for taxes or to claim for rentals by reason of the Trustee's failure to pay taxes.

Dated this 8th day of June, 1938.

JAMES ALGER FEE

Judge

[Endorsed]: Filed June 8, 1938. [95]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable James Alger Fee, Judge of the United States District Court, District of Oregon:

The Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, corporations, your petitioners, because they are aggrieved by the order rendered

and entered in this matter on the 8th day of June, 1938, wherein and whereby the Court sustained the exceptions filed herein to "Conclusions of law on the claims of mortgagees" numbered one to ten inclusive, of the report herein of the Special Master dated November 14, 1936, and held that the rents from mortgaged premises collected by the Trustee in said proceedings which were subject to petitioner's mortgages be held and disbursed by the Trustee as a part of the funds available for the payment of expenses of administration and general claims of the estate, do hereby jointly and severally appeal from said order and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the Assignment of Errors which is filed herewith, and [96] petitioners and each of them, respectively pray that their appeal be allowed jointly and severally and that citation issue as provided by law, and that a transcript of record, proceedings and papers upon which said order is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

Your petitioners further allege that Joseph A. West, co-party in interest under said order by virtue of being a mortgagee claiming rents and profits collected by the Trustee herein as allowed by Conclusion of law No. 9 of said Special Master's Report, has been duly notified and requested to join in this Petition for Appeal but has failed and refused to join therein; wherefore,

Your petitioners further pray that they be granted the right jointly and severally to appeal herein without joining said Joseph A. West as appellant.

And your petitioners further pray that the proper order touching the security to be required of them to perfect said appeal be made.

INVESTORS SYNDICATE

By STEPHEN H. BOYLES

Attorney

PORTLAND TRUST AND

SAVINGS BANK, Trustee

By VERNE DUSENBERY

HERBERT SWETT

Attorneys

METROPOLITAN LIFE INSURANCE COMPANY

By VERNE DUSENBERY

Attorneys

[Endorsed]: Filed June 30, 1938. [97]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, appellants, and jointly and severally file the following assignment of errors on appeal from the order of this court rendered and entered on the 8th day of June, 1938, in Cause No. B-18784.

1. That the Court erred in sustaining the exceptions of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to Conclusions of Law numbered one to five inclusive of the Special Master's Report dated November 14, 1936, wherein respectively the Master found that the net rentals and income from the Nordell Apartment, Resthaven Apartment, Chapman Court Apartment, Duplex Apartment (First) and Duplex Apartment (Second), in the hands of the Trustee, after making deductions therefrom of amounts representing (a) reasonable furniture rental, and (b) property management charge, should be held by the Trustee for the benefit of the Investors Syndicate to be applied toward the payment of its respective mortgages on said respective apartment properties, but limiting recovery in [98] the event of foreclosure sale to the amount of deficiency after said sale.

2. That the court erred in holding that all rentals collected by the Trustee in the above proceeding from the Nordell Apartment, Resthaven Apartment, Chapman Court Apartment, Duplex Apartment (First) and Duplex Apartment (Second), upon which the appellant, Investors Syndicate, held mortgages and which were collected prior to sale upon foreclosure of the property covered by said mortgages respectively, should be held and disbursed by said Trustee as a part of the funds available for the payment of expenses of administration and claims of the estate.

3. That the Court erred in sustaining the exceptions of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to Conclusions of law numbered six and seven of the Special Master's Report dated November 14, 1936 wherein the Master found and recommended that the net rentals and income from the Adele Manor and the Charmaine Apartment, in the hands of the Trustee, after making deductions therefrom of amounts representing (a) reasonable furniture rental, and (b) property management charge, should be held by the Trustee for the benefit of the Portland Trust and Savings Bank to be applied toward the payment of its respective mortgages on said respective apartment properties, but limiting recovery in the event of foreclosure sale to the amount of deficiency after said sale.

4. That the Court erred in holding that all rentals collected by the Trustee in the above proceeding from the Adele Manor and the Charmaine Apartment, upon which the appellant Portland Trust and Savings Bank held mortgages and which were collected prior to sale upon foreclosure of the property covered by said mortgages respectively, should be held and disbursed by said Trustee as a part of the funds available for the payment of expenses of administration and claims of the estate.

5. That the Court erred in sustaining the exceptions of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to

Conclusion of law numbered eight of the Special Master's Report dated November 14, 1936 wherein the Master found that the net rentals and income from the Maravilla Court Apartment, in the hands of the Trustee, after making [99] deductions therefrom of amounts representing (a) reasonable furniture rental, and (b) property management charge, should be held by the Trustee for the benefit of the Metropolitan Life Insurance Company to be applied toward the payment of its mortgage on said apartment property, but limiting recovery in the event of foreclosure sale to the amount of deficiency after said sale.

6. That the Court erred in holding that all rentals collected by the Trustee in the above proceeding from the Maravilla Court Apartment, upon which the appellant, Metropolitan Life Insurance Company, held a mortgage and which was collected prior to sale upon foreclosure of the property covered by said mortgage, should be held and disbursed by said Trustee as a part of the funds available for the payment of expenses of administration and claims of the estate.

Wherefore, the appellants jointly and severally pray that the aforesaid order of the District Court of the United States for the District of Oregon, entered June 8, 1938, be reversed, and that a decree be entered sustaining and confirming the Conclusions of law numbered one to eight inclusive and

No. 10 of the Special Master's Report dated November 14th, 1936.

STEPHEN H. BOYLES

Attorney for Investors Syndicate

VERNE DUSENBERRY

HERBERT SWETT

Attorneys for Portland Trust

and Savings Bank, Trustee

VERNE DUSENBERRY

Attorneys for Metropolitan Life

Insurance Company

[Endorsed]: Filed June 30, 1938. [100]

[Title of District Court and Cause.]

NOTICE TO JOSEPH A. WEST

To Joseph A. West:

You are hereby notified that the undersigned have filed their Petition for Appeal, a certified copy of which is hereto annexed and made a part hereof, from order of the above entitled court dated June 8th, 1938, sustaining exceptions to the Special Master's Report dated November 14th, 1936. You are hereby requested to join the undersigned in petition for said appeal in the above cause on or before the first day of July, 1938, at 10 o'clock A. M., in default of which you are hereby notified that the undersigned will move this court at the United States Court House in the City of Portland, at 10

o'clock A. M. on the first day of July, 1938, or as soon thereafter as counsel can be heard, for an order of severance for the purpose of said appeal in the above cause to the United States Circuit Court of Appeals for the Ninth Circuit.

INVESTORS SYNDICATE

By STEPHEN H. BOYLES

Atty.

PORTLAND TRUST AND

SAVINGS BANK, Trustee

By VERNE DUSENBERY

HERBERT SWETT

Attys.

METROPOLITAN LIFE INSURANCE COMPANY

By VERNE DUSENBERY

Attys.

Service of the foregoing Notice is hereby accepted and copy received this 28th day of June, 1938, at Portland, Oregon.

W. M. HUNTINGTON

Attorney for Joseph A. West

[Endorsed]: Filed June 30, 1938. [101]

[Title of District Court and Cause.]

ORDER ALLOWING APEAL

Upon consideration of the petition of the Investors Syndicate, Portland Trust and Savings Bank, Trustee, and the Metropolitan Life Insurance Com-

pany, for appeal from order entered herein June 8th, 1938, sustaining exceptions to "Conclusions of law on the claims of mortgagees" numbered one to ten inclusive of the report herein of the Special Master, dated November 14, 1936, by which order of this court, dated June 8, 1938, it was held that the rents from mortgaged premises collected by the Trustee in said proceedings which were subject to the mortgages of said petitioners shall be held and disbursed by the Trustee as a part of the funds available for the payment of expenses of administration and general claims of the estate.

And upon consideration of the assignment of errors intended to be urged by said petitioners; and,

It further appearing that Joseph A. West, co-party in interest with said petitioners under said order by reason of being a mortgagee claiming [102] rents and profits collected by the Trustee herein as allowed by Conclusion of law No. 9 of the Special Master's Report above referred to, has been duly notified and requested by said petitioners to join in said Petition for Appeal but has failed and refused to join therein, and the Court being fully advised,

It is hereby ordered that the appeal of said Investors Syndicate, Portland Trust and Savings Bank, Trustee, and the Metropolitan Life Insurance Company, be and it hereby is allowed jointly and severally, and that they are granted the right to appeal without Joseph A. West and without joining said Joseph A. West as appellant.

It is further ordered that said appellants shall give a good and sufficient appeal cost bond in the sum of \$500.00 conditioned as required by law.

Dated the first day of July, 1938.

JAMES ALGER FEE

Judge of the United States District Court

[Endorsed]: Filed July 1, 1938. [103]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know all men by these presents, that we, Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, as Principals, and Commercial Casualty Insurance Co., a corporation, as Surety, are held and firmly bound unto Lloyd R. Smith, Trustee in the Matter of Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, Bankrupts, Gesina King, Helen Winsor Johnson, Bert Why and Elsa Strathman, Petitioning Creditors, Mrs. Gow Why, Conrad Bauriedel, Ida Isabell Neilson, George J. and Emma C. Fourier, James T. Jones and Louis Knutson, Intervening Creditors, and Ralph A. Coan and S. J. Bischoff, Appellees, in the above cause, in the sum of \$500.00, to be paid to said Appellees, to which payment well and truly to be made we bind our-

selves, our successors and assigns, jointly and severally by these presents. [104]

Sealed with our seals and dated this 2d day of July, 1938.

Whereas, on the 8th day of June, 1938, in the District Court of the United States, for the District of Oregon, in a proceeding in bankruptcy pending in said Court, No. B-18784, bearing the above title, an order was rendered and entered against the Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, and the said Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, having obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and a Citation, directed to the said Appellees, citing and admonishing them, and each of them, to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of said Citation.

Now, if said Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, and each of them, jointly and severally, shall prosecute their Appeal to effect and answer and pay all costs, if they and each of them fail to make their plea good, then the above obliga-

tion to be void; else to remain in full force and virtue.

Sealed and delivered this 2nd day of July, 1938.

INVESTORS SYNDICATE

By STEPHEN H. BOYLES

Attorney

[Seal]

PORTLAND TRUST AND

SAVINGS BANK, Trustee

By J. W. DeGRAFF,

Vice Pres.

METROPOLITAN LIFE INSUR-
ANCE COMPANY

By VERNE DUSENBERY

Attorney

Principals

COMMERCIAL CASUALTY CO.

By M. L. LITTLE

Surety

Approved, this 5th day of July, 1938.

JAMES ALGER FEE

District Judge

[Endorsed]: Filed July 5, 1938. [105]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 106 constitute the transcript of an agreed statement of the case under Equity Rule 77 and of the

decree and papers on appeal in a bankruptcy case pending therein in which the Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, are Bankrupts, and Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company are Appellants, and Lloyd R. Smith, Trustee in the Matter of Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, Bankrupts, Gesina King, Helen Winsor Johnson, Bert Why, and Elsa Strathman, Petitioning Creditors, Mrs. Gow Why, Conrad Bauriedel, Ida Isabell Neilson, George J and Emma C. Fourier, James T. Jones and Louis Knutson, Intervening Creditors, and Ralph A. Coan and S. J. Bischoff, are Appellees; that I have compared the foregoing transcript of the said agreed statement of the case under Equity Rule 77 and of said decree and papers on appeal with the original thereof and that each of the same is a full, true, and complete copy of the original thereof as the same appears of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$16.25 and that the same has been paid by the said appellants.

In testimony, I have hereunto set my hand and the seal of said court at Portland, in said district, this 16th day of November, 1938.

[Seal]

G. H. MARSH,

Clerk. [106]

In the United States Circuit Court of Appeals,
for the Ninth Circuit

No. 8881

In the Matter of

GUARANTY TRUST COMPANY, a corpo-
ration, and NATIONAL INVESTMENT
COMPANY, a corporation, its affiliate,
Bankrupts.

INVESTORS SYNDICATE, PORTLAND TRUST
AND SAVINGS BANK, Trustee, and MET-
ROPOLITAN LIFE INSURANCE COM-
PANY,

Appellants,

vs.

LLOYD R. SMITH, Trustee in the Matter of
Guaranty Trust Company, a corporation, and
National Investment Company, a corporation,
its affiliate, Bankrupts, GESINA KING,
HELEN WINSOR JOHNSON, BERT WHY
and ELSA STRATHMAN, Petitioning Cred-
itors, MRS. GOW WHY, CONRAD BAURIE-
DEL, IDA ISABELL NEILSON, GEORGE
J. and EMMA C. FOURIER, JAMES T.
JONES and LOUIS KNUTSON, Intervening
Creditors, and RALPH A. COAN and S. J.
BISCHOFF,

Appellees.

PETITION FOR APPEAL

To the Honorable Judges of the United States
Circuit Court of Appeals, for the Ninth Circuit:

Your petitioners, Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, and each of them, jointly and severally, in the above entitled cause respectfully represent:

I.

That heretofore and on the 29th day of June, 1938, your petitioners filed a petition in the United States District Court, for the District of Oregon, for an order granting an appeal to this Court from an order made and entered in the above entitled proceeding by the said United States District Court, for the District of Oregon, on June 8th, 1938, sustaining the exceptions of the petitioning and intervening creditors and Ralph A. Coan and S. J. Bischoff to the Conclusions of Law, numbered one to ten inclusive, of the Special Master's Report, dated November 14th, 1936, wherein the Special Master found and recommended that the net rentals and income from the mortgaged properties in the hands of the Trustee, after deduction for rental value of furniture and property management fee, should be held by the Trustee for the benefit of the respective mortgagees, including your petitioners as such mortgagees, to be applied toward the payment of their mortgages on said properties respectively; and wherein the Court held rents collected by the

Trustee from said mortgaged properties should be held and disbursed by the Trustee as a part of the funds available for the payment of the expenses of the administration and the payment of the general creditors of the estate. By said petition your petitioners further allege that Joseph A. West, co-party in interest under said order by virtue of being a mortgagee claiming rents and profits as allowed by Conclusion of Law numbered Nine of said Special Master's Report, has been duly notified and requested to join in said Appeal but has failed and refused to join therein. A separate Notice was then and there served upon said Joseph A. West to be and appear before the Honorable James Alger Fee, Judge of the United States District Court, for the District of Oregon, on July 1st, 1938, at 10:00 o'clock A. M., to join in said Appeal, and said Notice stated that unless he so joined your petitioners would at said time pray for an order of severance for the purpose of said Appeal. Your petitioners further allege that on July 1st, 1938, they will apply for and secure an order from the Honorable James Alger Fee, Judge of the United States District Court, for the District of Oregon, granting said Appeal and permitting same to be prosecuted without joining Joseph A. West as appellant.

II.

That your petitioners further allege that said Joseph A. West, co-party in interest under said order by virtue of the facts hereinbefore set forth,

has been duly notified and requested to join in this petition for appeal, but has failed to join herein.

III.

That said order of the District Court of the United States, for the District of Oregon, was erroneous and the Court erred in entering said order, and that said order and determination was contrary to the law as more specifically set out in the Assignment of Errors filed herewith.

Wherefore, your petitioners, feeling aggrieved because of said order entered June 8th, 1938, and filed in the above entitled proceeding, jointly and severally petition for an Appeal from said order to the United States Circuit Court of Appeals, for the Ninth Circuit, and pray that said Appeal may be allowed jointly and severally without joining said Joseph A. West as appellant, and that a Citation may be issued and directed to Lloyd R. Smith, Trustee in the Matter of Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, Bankrupts, Gesina King, Helen Winsor Johnson, Bert Why and Elsa Strathman, Petitioning Creditors, Mrs. Gow Why, Conrad Bauriedel, Ida Isabell Neilson, George J. and Emma C. Fourier James T. Jones and Louis Knutson, Intervening Creditors, and Ralph A. Coan and S. J. Bischoff, demanding them to appear before the United States Circuit Court of Appeals, for the Ninth Circuit, to do and receive that which may be appurtenant to justice to be done in the premises,

and that a transcript of the record and evidence in said proceedings, duly authenticated, may be transferred to the United States Circuit Court of Appeals, for the Ninth Circuit.

INVESTORS SYNDICATE

By STEPHEN H. BOYLES

Attorney

PORTLAND TRUST AND

SAVINGS BANK, Trustee

By VERNE DUSENBERY

HERBERT SWETT

Attorney

METROPOLITAN LIFE INSURANCE COMPANY

By VERNE DUSENBERY

Attorney

Petitioners

[Endorsed]: Filed July 2, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ASSIGNMENT OF ERRORS

Come now Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, appellants, and jointly and severally file the following assignment of errors on appeal from the order of the United States District Court, for the District of Oregon, rendered and entered on the 8th day of June, 1938, in cause No. B-18784:

1. That the Court erred in sustaining the exceptions of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to Conclusions of Law numbered one to five inclusive of the Special Master's Report dated November 14th, 1936, wherein respectively the Master found that the net rentals and income from the Nordell Apartment, Resthaven Apartment, Chapman Court Apartment, Duplex Apartment (First) and Duplex Apartment (Second), in the hands of the Trustee, after making deductions therefrom of amounts representing (a) reasonable furniture rental, and (b) property management charge, should be held by the Trustee for the benefit of the Investors Syndicate to be applied toward the payment of its respective mortgages on said respective apartment properties, but limiting recovery in the event of foreclosure sale to the amount of deficiency after said sale.

2. That the court erred in holding that all rentals collected by the Trustee in the above proceeding from the Nordell Apartment, Resthaven Apartment, Chapman Court Apartment, Duplex Apartment (First) and Duplex Apartment (Second), upon which the appellant, Investors Syndicate, held mortgages and which were collected prior to sale upon foreclosure of the property covered by said mortgages respectively, should be held and disbursed by said Trustee as a part of the funds available for the payment of expenses of administration and claims of the estate.

3. That the court erred in sustaining the exceptions of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to Conclusions of Law numbered six and seven of the Special Master's Report dated November 14, 1936, wherein the Master found and recommended that the net rentals and income from the Adele Manor and the Charmaine Apartment, in the hands of the Trustee, after making deductions therefrom of amounts representing (a) reasonable furniture rental, and (b) property management charge, should be held by the Trustee for the benefit of the Portland Trust and Savings Bank to be applied toward the payment of its respective mortgages on said respective apartment properties, but limiting recovery in the event of foreclosure sale to the amount of deficiency after said sale.

4. That the Court erred in holding that all rentals collected by the Trustee in the above proceeding from the Adele Manor and the Charmaine Apartment, upon which the appellant Portland Trust and Savings Bank held mortgages and which were collected prior to sale upon foreclosure of the property covered by said mortgages respectively, should be held and disbursed by said Trustee as a part of the funds available for the payment of expenses of administration and claims of the estate.

5. That the Court erred in sustaining the exceptions of the petitioning and intervening creditors and of Ralph A. Coan and S. J. Bischoff to Con-

clusion of Law numbered eight of the Special Master's Report dated November 14, 1936, wherein the Master found that the net rentals and income from the Maravilla Court Apartment, in the hands of the Trustee, after making deductions therefrom of amounts representing (a) reasonable furniture rental, and (b) property management charge, should be held by the Trustee for the benefit of the Metropolitan Life Insurance Company to be applied toward the payment of its mortgage on said apartment property, but limiting recovery in the event of foreclosure sale to the amount of deficiency after said sale.

6. That the Court erred in holding that all rentals collected by the Trustee in the above proceeding from the Maravilla Court Apartment, upon which the appellant, Metropolitan Life Insurance Company, held a mortgage and which was collected prior to sale upon foreclosure of the property covered by said mortgage, should be held and disbursed by said Trustee as a part of the funds available for the payment of expenses of administration and claims of the estate.

Wherefore, the appellants jointly and severally pray that the aforesaid order of the District Court of the United States, for the District of Oregon, entered June 8, 1938, be reversed, and that a decree be entered sustaining and confirming the Conclusions of Law numbered one to eight inclusive and

number ten of the Special Master's Report dated November 14th 1936.

STEPHEN H. BOYLES

Attorney for Investors Syndicate

VERNE DUSENBERY

HERBERT SWETT

Attorneys for Portland Trust
and Savings Bank, Trustee

VERNE DUSENBERY

Attorney for Metropolitan Life
Insurance Company

[Endorsed]: Filed July 2, 1938. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

NOTICE TO JOSEPH A. WEST

To Joseph A. West:

You are hereby notified that the undersigned have filed their Petition for Appeal, a certified copy of which is hereto annexed and made a part hereof, from an order of the United States District Court, for the District of Oregon, dated June 8th, 1938, sustaining exceptions to the Special Master's Report dated November 14th, 1936.

You are hereby requested to join the undersigned in petitioning for said Appeal in the above cause on or before the day of July, 1938, at 10:00 o'clock A. M., in default of which you are hereby notified that the undersigned will, and do hereby, move this

Court for an order of severance for the purpose of said Appeal in the above cause from the United States District Court, for the District of Oregon, to the United States Circuit Court of Appeals, for the Ninth Circuit.

INVESTORS SYNDICATE

By STEPHEN H. BOYLES

Attorney

PORTLAND TRUST AND

SAVINGS BANK, Trustee,

By VERNE DUSENBERY

HERBERT SWETT

METROPOLITAN LIFE INSURANCE COMPANY

By VERNE DUSENBERY

Attorney

[Endorsed]: Filed July 2, 1938. Paul P. O'Brien, Clerk.

At a Stated Term, to wit: The October Term A. D. 1937, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the Nineteenth day of July in the year of our Lord one thousand nine hundred and thirty-eight.

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge Presiding, Honorable Francis A. Garrecht, Circuit Judge, Honorable Clifton Mathews, Circuit Judge.

[Title of Cause.]

ORDER ALLOWING APPEAL, ETC.

Upon consideration of the petition of Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, for an allowance of appeal herein under section 24(b) of the Bankruptcy Act filed July 2, 1938, and of the assignment of errors filed therewith, and by direction of the Court.

It is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United States for the District of Oregon, made and entered on the 8th day of June, 1938, sustaining exceptions to conclusions of law numbered one to ten inclusive of the report therein of the Special Master, dated November 14, 1936, be, and the same is hereby allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) within ten days from date.

It is further ordered that if an appeal in this cause has heretofore been allowed by said District Court, and a cost bond given on such appeal, then no bond for costs need be given on this appeal.

It further appearing that Joseph A. West, co-party in interest with said petitioners-appellants has been duly notified and requested by said petitioners-appellants to join in said petition for appeal, but has failed and refused to join therein, and the Court being fully advised,

It is further ordered that said petitioners and each of them be, and they are hereby jointly and severally granted the right to appeal without joining Joseph A. West as appellant.

[Title of Circuit Court of Appeals and Cause.]

CITATION ON APPEAL

The President of the United States of America
To Lloyd R. Smith, Trustee in the Matter of Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, Bankrupts, Gesina King, Helen Winsor Johnson, Bert Why and Elsa Strathman, Petitioning Creditors, Mrs. Gow Why, Conrad Bauriedel, Ida Isabell Neilson, George J. and Emma C. Fourier, James T. Jones and Louis Knutson, Intervening Creditors, and Ralph A. Coan and S. J. Bischoff, and each of you, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals, for the Ninth Circuit, wherein Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company are appellants, and

you are appellees, to show cause, if any there be, why the order dated June 8th, 1938 rendered against the said appellants and sustaining the exceptions to the Special Master's Report on the claims of the appellants as mortgagees to rentals in the hands of the Trustee in Bankruptcy, collected on mortgaged premises, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis A. Garrecht, United States Circuit Judge, for the Ninth Judicial District, this 20th day of July, 1938.

FRANCIS A. GARRECHT

United States Circuit Judge

Service of the within Citation and receipt of a copy thereof, admitted the 22nd day of July, 1938.

McCAMANT, THOMPSON,
KING & WOOD

Attorneys for Lloyd R. Smith,
Trustee in Bankruptcy

BISCHOFF & BISCHOFF

Of Attorneys for Petitioning
and Intervening Creditors
and Appellees other than
Lloyd R. Smith

[Endorsed]: Filed July 2, 1938. Paul P. O'Brien,
Clerk.

[Endorsed]: No. 8881. United States Circuit Court of Appeals for the Ninth Circuit. Investors Syndicate, Portland Trust and Savings Bank, Trustee, and Metropolitan Life Insurance Company, Appellants, vs. Lloyd R. Smith, Trustee in the Matter of Guaranty Trust Company, a corporation, and National Investment Company, a corporation, its affiliate, Bankrupts, Gesina King, Helen Winsor Johnson, Bert Why and Elsa Strathman, Mrs. Gow Why, Conrad Bauriedel, Ida Isabell Neilson, George J and Emma C. Fourier, James T. Jones and Louis Knutson, and Ralph A. Coan and S. J. Bischoff, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 21, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

